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NO. 87-5449

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM ANDREWS,

Petitioner,

vs.

KENNETH SHULSEN, Warden, Utah State Prison and DAVID L. WILKINSON, Attorney General of the State of Utah,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR THE RESPONDENTS

DAVID L. WILKINSON
Attorney General of Utah

DALLIN W. JENSEN
Solicitor General of Utah

EARL F. DORIUS, Counsel of Record
Assistant Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1135
Counsel for Respondents

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

A. The Trial.....1

1. The Guilt Phase.....2

2. The Sentencing Hearing.....7

B. The Direct Appeal.....8

C. The Initial State Postconviction Proceedings.....9

D. Initial Federal District Court Proceecdings.....9

E. The Second State Postconviction Proceeding.....11

F. The Renewed Proceedings in Federal District Court.....11

G. Tenth Circuit Court of Appeals.....12

REASONS FOR DENYING THE WRIT.....12

I.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE TENTH CIRCUIT'S DETERMINATION THAT NO EVIDENTIARY HEARING WAS REQUIRED ON PETITIONER'S RACE DISCRIMINATION AND FAIRNESS OF THE TRIAL ISSUES BECAUSE: (1) THE RULING IS IN ACCORD WITH CONTROLLING PRECEDENT AND THE VAST WEIGHT OF FEDERAL AUTHORITY; (2) THE DECISION BELOW TURNS ON ITS OWN FACTS; (3) PETITIONER MISSTATES ESSENTIAL FACTS; AND (4) PETITIONER PROCEDURALLY DEFAULTED THE RIGHT TO LITIGATE HIS RACE DISCRIMINATION CLAIMS ON FEDERAL HABEAS CORPUS.....12

A. THE TENTH CIRCUIT FOLLOWED CONTROLLING PRECEDENT WHICH SHOULD NOT BE REVISITED; THIS CASE TURNS ON ITS OWN FACTS; AND PETITIONER MISSTATES ESSENTIAL FACTS IN AN EFFORT TO GAIN REVIEW.....15

1. Publicity Before And During The Trial And Between The Guilt And Penalty Phases Had No Effect On Petitioner's Jury.....21

2. Utah's Jury Selection System Did Not Bar Non-White Citizens From Jury Service.....24

3. The Only Black In The Venire Was Not Excluded From The Jury By The Prosecutor's Peremptory Challenge.....27

4. Petitioner Made No Proffer Below That The Jury In This Case Was Affected By Anti-Black Religious Convictions, Nor Does The Record Support Such A Claim.....28

5. The Napkin Incident Was Properly Dealt With By The Trial Court And Was Insutficient, In The Context Of The Ehntire Record, To Raise A Reasonable Possibility That The Jury's Verdict Was Based On Anti-Black Community Sentiment.....29

6. Petitioner's Claim Of Disproportionate Imposition Of Death Penalty On Black Defendants Fails Under McCleskey.....32

B. PETITIONER IS PROCEDURALLY BARRED FROM LITIGATING HIS CLAIM OF RACE DISCRIMINATION IN HIS OWN CASE BECAUSE IT WAS NEVER PRESENTED TO THE STATE COURTS; PETITIONER IS ALO PROCEDURALLY BARRED FROM LITIGATING HIS SYSTEMIC RACE OF DISCRIMINATION CLAIM BECAUSE HE WAS FOUND BY THE STATE COURTS TO HAVE PROCEDURALLY DEFAULTED THE CLAIM UNDER STATE LAW BY NOT TIMELY RAISING IT ON DIRECT APPEAL, AND BY PROVIDING THE STATE HABEAS CORUTS WITH ONLY CONCLUSORY ALLEGATIONS IN SUPPORT OF THE CLAIM.....36

1. Petitioner Never Presented The State Courts With His Claim That His Convictions And Death Sentences Were The Result Of Race Discrimination In His Particular Case.....37

2. Petitioner's Systemic Discrimination Claim Was Found To Be Procedurally Defaulted By The State Courts.....41

II.

THE TENTH CIRCUIT PROPERLY APPLIED THE CONTROLLING DECISIONS OF THIS COURT IN FINDING THAT ANDREWS' DEATH SENTENCE WAS PROPORTIONATE PUNISHMENT UNDER THE PRINCIPLES OF ENMUND V. FLORIDA, 458 U.S. 782 (1982) AND CABANA V. BULLOCK, 474 U.S. 376 (1986), AND PROPERLY DENIED REHEARING ON PETITIONER'S CLAIM THAT TISON V. ARIZONA, 107 S. CT. 1676 (1987) REQUIRED A REMAND OF HIS CASE TO THE STATE COURTS FOR A REDETERMINATION OF THE EXTENT OF HIS CULPABILITY.....46

III.

BECAUSE PETITIONER HAS NEVER PREVIOUSLY RAISED THE "DOUBLE COUNTING" ISSUE, HE IS PROCEDURALLY BARRED FROM RAISING IT FOR THE FIRST TIME ON CERTIORARI. ADDITIONALLY, THE CAPITAL SENTENCING PROCEDURES IN UTAH ARE CONSTITUTIONAL AND THE GRANT OF CERTIORARI IN LOWENFIELD V. PHELPS, 86-6867, 55 U.S.L.W. 3852 (JUNE 22, 1987) DOES NOT REQUIRE THAT THIS COURT GRANT CERTIORARI IN THE PRESENT CASE.....55

A. PETITIONER IS PROCEDURALLY BARRED FROM RAISING THE CLAIM FOR THE FIRST TIME ON CERTIORARI.....56

B. THE GRANT OF CERTIORARI IN LOWENFIELD DOES NOT REQUIRE THE GRANT OF CERTIORARI IN THE PRESENT CASE BECAUSE OF DISTINGUISING FEATURES IN UTAH'S CAPITAL SENTENCING SYSTEM.....59

IV.

PETITIONER'S ATTEMPT TO SEEK REVIEW OF A CAPITAL SENTENCING STANDARD WHICH THE UTAH SUPREME COURT ESTABLISHED IN ANOTHER UNRELATED CASE SHOULD BE REJECTED BECAUSE PETITIONER DID NOT ADEQUATELY PRESERVE THE ISSUE IN HIS OWN CASE; HE DEFAULTED IT FOR FEDERAL HABEAS CORPUS REVIEW; HE DID NOT FRAME IT IN THE SAME CONTEXT IN THE LOWER COURTS; THE STANDARD IS BASED UPON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS; THE STANDARD IS NOT REQUIRED UNDER CONTROLLING DECISIONS OF THIS COURT; AND THERE IS NO CONFLICT IN THE CIRCUITS WHICH UNIFORMLY CONCUR WITH OTHER FEDERAL AND STATE JURISDICTIONS THAT SUCH A SENTENCING STANDARD IS NOT CONSTITUTIONALLY REQUIRED.....65

CONCLUSION.....78

TABLE OF AUTHORITIES

Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, 464 U.S. 1063 (1984) 63-64

Addington v. Texas, 441 U.S. 418 (1979) 75

Allen v. Hardy, 106 S. Ct. 2878 (1985) 28

Andrews v. Morris, 449 U.S. 891 (1980) 10, 48

Andrews v. Morris, 607 P.2d 816 (Utah), cert. denied, 449 U.S. 891 (1980) ..... passim

Andrews v. Morris, 677 P.2d 81 (Utah 1983) 11, 53, 56, 66-68

Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984) ..... passim

Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986) ..... passim

Andrews v. Utah, 439 U.S. 882 (1978) 8

Barclay v. Florida, 463 U.S. 939 (1983) 73

Beaver v. Bisley, 730 F.2d 1228 (4th Cir.), cert denied, 469 U.S. 838 (1984) 12, 14

Batson v. Kentucky, 476 U.S. 79 (1986) 28, 31

Blackledge v. Allison, 431 U.S. 63 (1976) 27

Boone v. Maxwell, 423 F.2d 1056 (9th Cir. 1970) (10th Cir. 1986) 14

Cabana v. Bullock, 106 S. Ct., 689 (1986) 47-48, 52-53, 55

California v. Ramos, 463 U.S. 992 (1983) 62

Cardiano v. Morris, 660 P.2d 1101 (Utah 1983) 39

Cardinale v. Louisiana, 394 U.S. 437 (1969) 59

Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied, 474 U.S. 1013 (1985) 59-65

Delta Airlines v. August, 450 U.S. 346 (1981) 59

Dennis v. United States, 339 U.S. 162 (1950) 30

Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981) 45

Dobard v. State, 435 So.2d 1338 (Ala. Cr. App. 1982), cert. denied, 464 U.S. 1063 (1984) 57

Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983) 468 U.S. 1220, cert. denied, 104 S. Ct. 3591 (1984) 45

Duren v. Missouri, 439 U.S. 35 (1979) 25-26

Eddings v. Oklahoma, 455 U.S. 104 (1982) 74

Engle v. Isaac, 456 U.S. 107 (1982) 40-41, 57-58, 71

Enmund v. Florida, 458 U.S. 782 (1982) 47-48, 53-55

Estes v. Texas, 381 U.S. 532 (1965) 22

Fontaine v. United States, 411 U.S. 213 (1973)..... 27

Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert. denied, 464 U.S. 865 (1984)..... 76

Furman v. Georgia, 408 U.S. 238 (1972)..... 8, 56, 63

Godfrey v. Georgia, 446 U.S. 420 (1980)..... 61, 63

Gray v. Lucas, 677 F.2d 1086 (5th Cir.), reh'g denied 685 F.2d 139, cert. denied, 461 U.S. 910 (1983)..... 57, 4, 77

Gregg v. Georgia, 428 U.S. 152 (1976)..... 8, 35, 70, 72

Harris v. Pulley, 692 F.2d 1189 (9th Cir.), cert. denied, 460 U.S. 1047 (1983)..... 77

Hochenbury v. Sowders, 620 F.2d 111 (6th Cir.), reh'g denied, 633 F.2d 443, cert. denied, 450 U.S. 933 (1981)... 45

Illinois v. Gates, 459 U.S. 1028 (1982)..... 59

In re Winship, 397 U.S. 358 (1970)..... 75

Irvin v. State, 617 P.2d 588 (Okla. 1980)..... 78

Jackson v. State, 337 So.2d 1242 (Miss. 1976)..... 77

Jurek v. Texas, 428 U.S. 262 (1976)..... 8, 62, 74

Leatherwood v. State, 435 So.2d 645 (Miss. 1983), cert. denied, 465 U.S. 1084 (1984)..... 57, 60, 63

Lessins v. Lockhart, 822 F.2d 764 (8th Cir. 1987)..... 40

Lockett v. Ohio, 438 U.S. 586 (1978)..... 52

Greenfield v. Phelps, No. 86-6867, 55 U.S.L.W. 3852, 3876 (June 22, 1987)..... 55-56, 64-65

McCleskey v. Kemp, 107 S. Ct. 1756 (1987)..... passim

Machibroda v. United States, 368 U.S. 487 (1973)..... 27

Michigan v. Long, 463 U.S. 1032 (1983))..... 45

Morishita v. Morris, 702 F.2d 207 (10th Cir. 1983)..... 44

Murray v. Carrier, 106 S. Ct. 2639 (1986)..... 40-41, 58, 70

People v. Kubat, 447 N.E.2d 247 (Ill. 1983), cert. denied, 464 U.S. 865 (1983)..... 57

People v. Frierson, 25 Cal.3d 142, 158 Cal. Rptr. 281, 599 P.2d 587 (1979)..... 77

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)..... 26-27

Phillips v. Smith, 717 F.2d 44 (2d Cir.), cert. denied, 465 U.S. 1027 (1984)..... 45

Picard v. Connor, 404 U.S. 270 (1971)..... 25, 56

Pierre v. Morris, 607 P.2d 812 (Utah), cert. denied, 449 U.S. 891 (1980)..... 9, 10, 44

Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986), cert. denied ___U.S.___ (No. 86-6303, April 27, 1987)..... 12, 70

Pinch v. North Carolina, 459 U.S. 1056 (1982)..... 75

Price v. Johnson, 334 U.S. 266 (1948)..... 27

Proffitt v. Florida, 428 U.S. 242 (1976)..... 8, 73

Ratcliff v. Estelle, 597 F.2d 474 (5th Cir.), cert. denied, 444 U.S. 868 (1979)..... 45

Reed v. Ross, 468 U.S. 1 (1984)..... 40, 45 57. 70

Remmer v. United States, 347 U.S. 227 (1954)..... 30-31

Rideau v. Louisiana, 373 U.S. 723 (1963)..... 22

Ristaino v. Ross, 424 U.S. 589 (1976)..... 31

Robbins v. Cook, 737 P.2d 225 (Utah 1987)..... 39, 57

Robbins v. Cook II, Utah Sup. Ct. No. 870134 (May 29, 1987).. 39, 57

Selby v. Shulsen, 600 F. Supp. 432 (D. Utah 1984)..... 11

Sheppard v. Maxwell, 384 U.S. 723 (1963)..... 22

Smith v. Commonwealth, 599 S.W.2d 900 (Ky. 1980)..... 77

Smith v. Phillips, 455 U.S. 209 (1982)..... 30-31

Smith v. Murray, 106 S. Ct. 2661 (1986)..... 40-41, 57-70

Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.), cert. denied, 440 U.S. 976 (1979), reh'g denied, 441 U.S. 937 (1979)..... 9, 40, 44

State v. Andrews, 574 P.2d 709 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978).... passim

State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941 (1980)..... 58

State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979)..... 58

State v. Mata, 609 P.2d 48 (Ariz.), cert. denied 449 U.S. 938 (1980)..... 77

State v. Monroe, 397 So.2d 1258 (La. 1981), cert. denied, 463 U.S. 1229 (1983)..... 57

State v. Pierre, 572 P.2d 1338 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978)..... 8, 38 47-52

State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981)..... 58, 77

State v. Shaw, 272 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 1026-27 (1979)..... 78

State v. Simants, 250 N.W.2d 881 (Neb.), cert. denied, 434 U.S. 878 (1977)..... 77

State v. Taylor, 304 N.C. 249, S.E.2d 761 (1981), cert. denied, 463 U.S. 1213 (1983)..... 57

State v. Wood, 648 P.2d 71, 78 (Utah), cert. denied, 459 U.S. 988 (1982)..... 10-11, 65-66, 69, 75

Tanner v. United States, 55 U.S.L.W. 4942 (1987)..... 30

Teague v. Tennessee, 473 U.S. 911 (1985)..... 75

Thompson v. Lynaugh, 821 F.2d 1054 (5th Cir. 1987)..... 64

Thompson v. Lynaugh II, 821 F.2d 1080 (5th Cir. 1987)..... 45

Tison v. Arizona, 107 S. Ct. 1676 (1987)..... 48-49, 52, 53, 55

Townsend v. Sain, 372 U.S. 293 (1963)..... 12-16, 35

Turner v. Murray, 476 U.S. 1 (1986)..... 20, 29, 31

United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982)..... 45

United States ex rel. Veal v. DeRoberts, 693 F.2d 642 (7th Cir. 1982)..... 45

United States v. Matthews, 73 M.J. 501 (1980)(en banc)..... 77

Vasquez v. Hillery, 106 S. Ct. 617 (1986)..... 25

Wainwright v. Sykes, 433 U.S. 72 (1977)..... 40, 57

Welcome v. Blackburn, 793, F.2d 672 (5th Cir. 1986), cert. denied, 107 S. Ct. 1985 (1987)..... 64

Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987)..... 64

Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 106 S. Ct. 1984 (1987)..... 64

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 75

Ybarra v. State, 679 P.2d 797 (Nev.), cert. denied, 470 U.S. 1009 (1985)..... 78

Zant v. Stephens, 462 U.S. 862 (1983)..... 61-62, 70, 72

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES

Laws of Utah 1971 (1st S.S.), Ch. 8 § 1..... 25

25 U.S.C.A. § 2254..... 16

United States Constitution, Sixth Amendment..... 19

United States Constitution, Eighth Amendment..... 49, 52, 55, 65

United States Constitution, Fourteenth Amendment..... 19, 65

Utah Code Ann. § 76-5-202 (Supp. 1973)..... 61

Utah Code Ann. § 76-3-206 (Supp. 1973)..... 1, 61

Utah Code Ann. § 76-3-207 (Supp. 1973)..... 1, 7-8, 61

Utah Code Ann. § 76-5-202 (Supp. 1973)..... 1

Utah Code Ann. § 78-46-8 (1953)..... 25

Utah Code Ann. § 78-46-17 (Supp. 1973)..... 25

Utah R. Civ. Proc. Rule 65B(i)(2)(4)..... 39

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KENNETH SHULSEN, Warden, Utah State Prison and DAVID L. WILKINSON, Attorney General of the State of Utah,

Respondents.

BRIEF IN OPPOSITION FOR THE RESPONDENTS

STATEMENT OF THE CASE

A. The Trial.

Petitioner Andrews and two co-defendants, Selby and Roberts, all three of whom were black, were charged in the Second Judicial District Court, Weber County, Utah with three counts of first degree murder and two counts of aggravated robbery for the killings of three persons in the course of a robbery at the Hi-Fi Shop in Ogden, Utah. They were the first to be tried under the 1973 Utah capital punishment statutes, Utah Code Ann. §§ 76-3-206, 207 (Supp. 1973); § 76-5-202 (Supp. 1973) (set forth in Appendix A). The statutes require a showing of an intentional or knowing killing under certain statutorily defined aggravating circumstances to be proved beyond a reasonable doubt at the guilt phase as elements of first degree murder, followed by a separate sentencing hearing where mitigating circumstances and additional aggravating factors are considered. The defendants were charged and the jurors were instructed at the guilt phase on six aggravating circumstances in this case: (1) multiple intentional killings; (2) at the time of the killing, intentionally creating a great risk of death to others than the victim and himself; (3) killing in perpetration of a robbery; (4) killing in perpetration of a rape; (5) killing for the purpose of pecuniary gain; and (6)

killing for personal gain (R. 159, 201, and Instr. No. 8 at R. 351-52).[1]

1. The Guilt Phase.

The following evidence was adduced at the guilt phase of the trial:

On April 22, 1974, the basement of the Hi-Fi Shop in downtown Ogden, Utah, became the scene of a brutal and torturous four-hour detention, robbery and murder which left three people dead and two seriously wounded.

Store employees, Stanley Walker (early 20's), Michelle Ansley (19), and their acquaintance Cortney Naisbitt (17), were taken captive by Andrews and Selby at gunpoint into the basement of the Hi-Fi Shop sometime between 5:45 p.m. and 7:00 p.m. (3058, 3060-61).[2] They were bound hand and foot (3069-70). Petitioner and Selby then removed virtually the entire inventory of stereo equipment from the store.

Stanley's father, Orren Walker, became concerned when his son failed to come home for dinner. At 7:45 p.m. he went to the Hi-Fi Shop. He entered and saw that most of the stereo equipment was missing. As he approached the basement stairway, Andrews and Selby confronted him with guns and forced him down the stairs.[3] Selby's gun discharged twice which momentarily startled Andrews who was standing in front of Selby at the time and prompted him to say, "What did you do that for, man?" (3071-72). After Orren reached the basement, Andrews opened his revolver and gave the chamber a roll (3068). Orren observed the three young people lying on the floor pleading for their lives saying they were too young to die and begging Andrews and Selby to just take the equipment and leave (3072-75). Orren overheard

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1 The jurors were also instructed that they had to unanimously agree on at least one of the aggravating circumstances to convict and were barred from accumulating their vote on differing alternatives pleaded by the State (Instr. No. 11, R. 356).

2 This notation refers to the trial transcripts. "R" refers to the state record of pleadings.

3 Andrews was armed with a .38 caliber short-barreled revolver (1981, 1986, 3068), and Selby with a .25 caliber, semi-automatic automatic (1979, 1982-88, 3068).

discussion between the two assailants. Selby said, "What about me being booked?" and waived his gun toward the south (the direction of the Weber County jail) (3074-75). The victims continued to plead for their lives (3075). The assailants then began discussing a tall container which they had previously put on a stool. It had a cloth placemat wrapped around it so that any labels could not be read (3075-77). Selby went to the workshop toward the center of the basement and returned with a cup (3076). Andrews uncapped the tall container and poured a substance into the cup which Selby tried to force Orren to give the victims to drink (including Orren's own son) (3077, 3085). Michelle asked what it was and Andrews said it was a mixture of vodka and a German drug (3077). It was Drano, a liquid drain cleaner containing sodium hydroxide (2208-10).[4] When Orren refused to administer the caustic, Andrews placed a gun at his head and threatened him saying, "Man, there is a gun at your head!" (3078). Orren still refused, so Selby set the cup back on the stool and tied Orren's hands and feet while Andrews held a gun on Orren. Orren was ordered to lie down on the basement floor by the others (3078-80).

Carol Naisbitt also became concerned when her son, Cortney, failed to return home. She too went to the Hi-Fi Shop arriving at about 8:00 p.m. Selby captured her at gunpoint upstairs while Andrews guarded the other victims. She was then placed bound next to her son on the basement floor (3080-81, 3083). Andrews had Selby run back upstairs to lock the door to the shop (3081, 3083).

At approximately 8:30 p.m. (3149), in front of the others, Selby compelled Carol to drink the drain cleaner which Andrews had poured, which caused loud coughing and spitting (3084-85, 3127, 3182). In turn Cortney, Stanley, Michelle, and Orren were forced to drink. Each successive ingestion caused

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4 Three weeks earlier, Selby was seen at the movie "Magnum Force," a scene from which depicts a pimp pouring Drano down a prostitute's throat to kill her (1614-15). Notably, the owner of the Hi-Fi Shop testified there was no liquid Drano kept at the store, and he did all purchasing for the business (2920).

hard coughing, spitting, and violent vomiting, yet Andrews continued to pour and Selby continued to administer the corrosive chemical (3084-87, 3128, 3182).[5] Orren noted the liquid smelled extremely strong, that it stung violently, and burned his mouth (3086). Unlike the other victims, Orren did not swallow the substance, but held it in his mouth and eventually let the chemical slowly drain unnoticed out of his mouth (3087). His forehead and shoulder became badly scarred from lying in the resulting pool (3133). Stanley could still speak and so was given a second dose which produced yet more violent vomiting (3087). To ensure that the Drano had its desired effect, both assailants covered three of the victims' mouths with tape (2189, 3087-88). At no time did Andrews display any fear over pouring the Drano, and at no time did either assailant threaten the other if he did not administer the substance (3208, 3211).

At 9:00 p.m. the assailants conversed in whispers and then went upstairs to wipe up fingerprints (3088-91, 3186). They returned to the basement (3092, 3186, 3208-09), and as Orren feigned death, Selby removed Orren's watch and wallet (3095-96).

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[5] Autopsies on Michelle, Carol and Stanley revealed extensive sodium hydroxide burns on their lips, gums, tongues, larynxes, esophaguses, stomachs and other parts of their bodies which came in contact with the chemical (2142-43, 2169-70, 2183, 2194-98). Their gastro-intestinal tracts were described as eroded, corroded and acutely burned to the degree of being almost hemorragic (the chemical had eaten and burned the surface layer of mucosa and connective tissue of the esophagus) (2143, 2169-70). Although Cortney survived, he too sustained severe damage to his gastro-intestinal tract having developed webs at the top of his esophagus and a stricture at the bottom. He also suffered drainage from his esophagus, passed part of his stomach rectally, lost over forty pounds by the time of trial, ran temperatures of 104 degrees, and developed peritonitus due to leakage from his esophagus that burned through the diaphragm and leaked into the peritoneal cavity (2547-51). The state medical examiner concluded that but for the intervening gunshot wounds the victims later received, the Drano would have caused their deaths if they had been left unattended for 12-24 hours (2199-2201, 2550). Even then, whether they would have died would have depended on how good the medical attention was because the damage from the Drano was so severe (2199). The burning would have completely torn up all the layers of organs leaving scarring and a narrowing of the esophagus, rendering the persons unable to eat properly, and requiring constant medical attention the rest of their lives (2201). The chemical would have continued to burn until it perforated the esophagus spilling into the chest where the heart and lungs are unprotected--a condition which would cause immediate death (2199). Also if the stomachs became perforated, the peritoneum cavity would be burned causing peritonitus (the life-threatening condition which Cortney eventually developed) (2199-2200, 2550).

Andrews asked how much was in it, and Selby disgustedly said, "five bucks." Andrews told Selby to "take the whole thing," which he did (3095). Orren heard mumbled conversation between the assailants, but could only discern Andrews saying, "I can't do it, I'm scared" and later Selby's reply to Andrews saying, "about thirty minutes" (3092-93, 3095, 3187). Andrews then ran upstairs. The back door opened and closed (3092). The door was not rebolted (3213).

Selby remained downstairs with the victims for the final thirty minutes of the four hour detention (3096). He shot Carol in the head while she lay facing her son (3101, 3084). He shot Cortney in the head thirty seconds later (3101). Four minutes later, Orren heard a bullet strike the floor near his head (3101). Two minutes later, he heard his son, Stanley, shot (3102). Selby left momentarily, and Orren heard Michelle ask Stanley if he was all right (3102). Stanley was able to reply that he had been shot (3102). Selby then returned and a bullet "stung" into Orren's head (3103). All of the foregoing shots were from the .25 caliber automatic (2182, 2192. 3084, 3101-02). Selby untied Michelle and took her into a back room (3103-04, 3127). Orren continued to feign death (3105). When Selby brought Michelle back fifteen minutes later, she was naked. She had been raped (3106-10, 2176-79). Selby laid her down at her appointed place and then ran upstairs (3109). Selby returned now armed with Andrews' .38 caliber revolver and shot Michelle in the back of the head (2144, 2192, 3109-10). Stanley was then shot a final time with the .38 (1938-42, 2192).[6] His breathing, which Orren had been able to hear up to that time, now ceased (3110).

Selby tried to discern if Orren was dead (3112). He then attempted to strangle Orren with an electrical cord (3110, 3119). Only by tensing the muscles of his neck was Orren able to survive the strangulation attempt while still playing dead (3110). The cord was left so tightly tied, his head swelled

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[6] Police officers located five .38 caliber slugs at the scene which had all been fired by the same gun (1892, 1906, 1910, 1913, 1918, 1922-23, 1942-43, 1986-93). Another .38 caliber slug was removed from Stanley's head during the autopsy (1938-42).

(3119). Orren felt a pointed object shoved into his ear and kicked three times (1846, 3111, 3113). It was a seven-inch long ballpoint pen (3124-25). Somehow Orren was able to keep from flinching as he felt the pen go deeper and deeper with each kick (3112-13). All but two inches of the pen entered his head (3125). Orren continued to feign death (3112-13). Finally, all assailants were gone.

Sometime after 10:00 p.m., Orren heard the voice of his other son and his wife upstairs, and the four hours of immediate terror were over (1800). Michelle and Stanley lay dead. Carol Naisbitt died en route to the hospital. Cortney survived but with serious permanent injuries. Orren survived to give eyewitness testimony at the trial (3057-3136).

In addition to Orren's personal account, witness after witness corroborated his testimony and implicated Andrews and Selby.[7]

Andrews and Selby were found guilty on three counts of first degree murder and two counts of aggravated robbery. Their co-defendant, Roberts, was convicted of the aggravated robbery charges but the jury could not return a verdict on the murder counts (4108-09).[8]

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[7] Some of this evidence is summarized in the federal district court's opinion in Andrews v. Shulsen, 600 F. Supp. 408, 413 n. 2 (D. Utah 1984). Notable are the facts that one witness overheard Andrews, two months prior to the crime, state that "One of these days I would like to rob a hi-fi shop and if anybody gets in my way I will kill them." (1549) (emphasis added). Three days before the murders, Andrews and Roberts were seen "casing" a stereo wholesale business with four other people (1564-68). Two days before the murders, Andrews and Selby were seen at the Hi-Fi Shop asking Stanley Walker about stereo prices, and writing down prices and serial numbers of stereo equipment, etc. Selby was observed at that time going to the back stairway and looking down into the basement (1577-88, 1590-94). The day after the homicides, Andrews, Selby and Roberts left a .25 caliber automatic with a friend saying there was going to be a raid on the Air Force base (where they were stationed and resided) (2321-23). Roberts also asked the friend to hold a stereo tape deck for Andrews. Andrews told the friend not to tell anyone, saying it was "hot" (2325-26). The tape deck contained Orren Walker's watch (2417-18). The watchband was found in a wastebasket in Andrew's room (3054).

[8] Facts relating to Robert's participation in the events have been omitted from this brief.

2. The Sentencing Hearing.

A separate sentencing hearing was held pursuant to Utah Code Ann. § 76-3-207 (Supp. 1973). The State introduced Andrews' military records reflecting several disciplinary actions for failure to report to duty, leaving his appointed place of duty, and leaving the scene of an accident. His military grade was reduced for misconduct, and the Air Force had commenced action to have him separated early from the service on grounds he was a "marginal performer . . . of limited potential." (4142-46). Evidence was also introduced that Andrews was on probation for felony theft when the murders occurred (4195).

Andrews testified concerning his family background, level of education (high school equivalent), and prior criminal history (burglary and auto theft) (4247-70).

The sentencing instructions (1) required that any death verdict be unanimous (Sent. Instr. No. 6, R. 416); (2) required the jury to consider and weigh the aggravating factors against the mitigating ones (Sent. Instr. No. 1, R. 412);[9] (3) placed the burden of proof to show the jury that a death sentence was appropriate on the State (Sent. Instr. No. 2, R. 412); (4) allowed the jury to consider evidence received at both guilt and penalty phases (Sent. Instr. Nos. 4 and 1, R. 414, 412); (5) focused the jury's attention on the nature and circumstances of the crime, the character of the defendant, his background, personal history, his mental and physical condition and other factors; (6) specifically focused on such factors as whether defendant had any significant criminal history, whether the murder was committed under the influence of any mental or emotional disturbance or duress, whether he acted under duress or substantial domination of another person, the general capacity of the defendant to appreciate the wrongfulness of his conduct, or the ability to conform his conduct

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[9] On Andrews' and Selby's direct appeal, the Utah Supreme Court articulated Utah's capital sentencing standard as requiring the State to prove that "the totality of evidence of aggravating circumstances must . . . outweigh the totality of mitigating circumstances," and found the sentencing instructions in this case satisfied this requirement. State v. Pierre, 572 P.2d 1338, 1348 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978).

to the standards required by law and whether such capacity was substantially impaired as a result of any mental disease or intoxication, the youth of the defendant at the time of the crime, whether he was a party to the murder committed by another person and his participation was relatively minor; and (7) expressly prohibited the jury from considering any information not presented in the trial or sentencing proceedings (Sent. Instr. No. 4, R. 414). Cf. Utah Code Ann. § 76-3-207 (Supp. 1973).

The jury returned unanimous verdicts of death on all three murder counts on November 20, 1974 (4306). On November 27, 1974, the trial court sentenced Petitioner and Selby to death in accordance with Utah law.

B. The Direct Appeal.

Petitioner and Andrews unsuccessfully challenged their convictions and sentences on direct appeal. State v. Pierre, 572 P.2d 1338 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978); State v. Andrews, 574 P.2d 709 (Utah), reh'g denied, 576 P.2d 857 (1977), cert. denied, 439 U.S. 882 (1978). The Utah Supreme Court held inter alia that Utah's statutes on their face and as applied met the constitutional requirements of Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 152 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). State v. Pierre, 572 P.2d at 1345, 1356; State v. Andrews, 574 P.2d at 710. The court performed the review function suggested by those cases by examining the record and determined that the death sentences had not been arbitrarily, discriminatorily or disproportionately imposed in either Andrews' or Selby's case. State v. Andrews, 574 P.2d at 710-11; State v. Pierre, 572 P.2d at 1355. The court also found that they had received a fair trial, and that their jury had been impartial. State v. Pierre, 572 P.2d at 1348-50; State v. Andrews, 574 P.2d at 710.

Certiorari was denied by this Court on October 2, 1978 in Andrews v. Utah, 439 U.S. 882 (1978).

C. The Initial State Postconviction Proceedings.

Petitioner and Selby pursued collateral proceedings in state district court attempting to relitigate claims raised on direct appeal, and to litigate claims not previously asserted.10

The petitions were dismissed by the court on the ground that all issues were either raised or could have been raised on direct appeal, and were thus barred from post conviction review under Utah law. The new claim of arbitrary and discriminatory application of the death penalty in Utah and the United States was additionally rejected for failure to state a claim. The state district judge's findings and conclusions are quoted in full in Andrews v. Morris, 607 P.2d 816, 819-20 (Utah 1980).

The Utah Supreme Court affirmed the lower court's dismissal of the petitions based upon procedural bar. See the companion decisions of Andrews v. Morris, 607 P.2d 816, 818-21 (Utah), cert. denied, 449 U.S. 891 (1980); Pierre v. Morris, 607 P.2d 812, 813-15 (Utah), cert. denied, 449 U.S. 891 (1980). The court found dismissal was also appropriate because the petitions for relief were drawn in conclusional language and were lacking in factual data to support their allegations. Andrews, 607 P.2d at 821. It alternatively rejected the claim of systemic discriminatory application of the death penalty as a matter of law relying on the rationale of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.), cert. denied, 440 U.S. 976 (1979), reh'g denied,

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10 Among Andrews' new claims were (1) that Utah's death sentencing system had no standards or burdens of proof for finding and weighing the aggravating and mitigating factors for capital sentencing; (2) that the imposition of the death penalty without an express finding that he took a life or intended that a life be taken was unconstitutional; and (3) that the application of the death penalty in Utah and the United States was arbitrary and discriminatory. See Am. Petition, 11/24/78, St. H.C.R. Vol. I at pp. 5-10 (R. Vol. XV) (Attached as Appendix B). As will be shown infra, Andrews did not raise in his state habeas petition, and never raised in the state courts, several of the claims he now asserts in his Petition for Certiorari. Specifically, he failed to raise most of the facts he now offers in support of his claim of systemic race discrimination and race discrimination specific to his own case; he failed to raise the issue whether Utah's death sentencing permits a death sentence to be imposed upon consideration of aggravating factors that do no more than repeat elements of the crime (his Lowenfield v. Butler claim); and he never asserted that the reasonable doubt sentencing standard announced in State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988 (1982), was required under the Eighth Amendment of the federal constitution.

441 U.S. 937 (1979). Pierre, 607 P.2d at 814; Andrews, 607 P.2d at 825.

Certiorari was denied by this Court on October 6, 1980. Andrews v. Morris, 449 U.S. 891 (1980).

D. Initial Federal District Court Proceedings.

In November 1980, Andrews and Selby filed for federal habeas corpus relief. Respondents moved to dismiss the petitions on the dual grounds that the issues could be dismissed as a matter of law without need for an evidentiary hearing, and that petitioners were procedurally barred from litigating certain claims. The court issued a Preliminary Order authorizing an evidentiary hearing on two issues: (1) whether an inherently prejudicial atmosphere prevailed at trial and the jurors were exposed to specific improper influences; and (2) whether Utah's death penalty was being arbitrarily and discriminatorily applied systemically.[11] Limited discovery on these issues was permitted.

Immediately prior to the scheduled hearing, the Utah Supreme Court issued a ruling in another capital case modifying Utah's capital sentencing standard from that which had been applied in petitioner's, Selby's, and other capital defendants' cases:

> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in the circumstances.

State v. Wood, 648 P.2d 71, 78 (Utah), cert. denied, 459 U.S. 988 (1982).[12] The Wood ruling was not based on federal or state constitutional grounds, but on "preferred grounds of statutory

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11 Petitioner had not specifically alleged or sought an evidentiary hearing to establish whether racially prejudicial factors were present in his own case. Thus, the preliminary order does not address this subject.

12 Neither Selby nor Andrews had ever argued for this particular sentencing standard in prior state court proceedings. See State v. Wood, 648 P.2d at 80; State v. Pierre, 572 P.2d 1338; State v. Andrews, 574 P.2d 709; Pierre v. Morris, 607 P.2d 812; Andrews v. Morris, 607 P.2d 816; Andrews v. Morris, 677 P.2d 81, 86-88 (Utah 1983). See also all briefs in those cases.

construction." 648 P.2d at 82-83. Further proceedings on federal habeas corpus were stayed and petitioners were ordered to return to the Utah Supreme Court to seek possible relief under the Wood decision on the theory that Wood might be dispositive of the instant litigation and the Utah Supreme Court should determine the issue of retroactive application of state law (R. Vol. VI, 1086).

E. The Second State Postconviction Proceeding.

Petitioner and Selby filed petitions for writs of habeas corpus in the Utah Supreme Court seeking an order vacating their death sentences on the theory that the sentencing standard applied in their case was insufficient in light of Wood, that use of the previous standard in their case was not harmless error, and that failure to give them the retroactive benefit of Wood would deny them equal protection of the law. The court denied relief on all grounds, applying well-established federal principles of retroactivity law and state doctrines of harmless error and finding no merit to their equal protection claim. Andrews v. Morris, 677 P.2d 81 (Utah 1983).[13]

F. The Renewed Proceedings in Federal District Court.

Having exhausted state remedies on the Wood issue, the parties resumed the federal habeas proceedings. Petitioner and Selby were granted leave to file Second Amended Petitions. The parties were ordered to file supplemental memoranda on all issues on the law occurring since the prior briefing of the case, and on whether an evidentiary hearing would still be required on the two issues previously set forth in the court's Preliminary Order. See Scheduling Order (R. Vol. VI, 1089-90).

After considering the petitions, memoranda, arguments of counsel, pertinent authorities, and the entire record, the District Court denied petitioner's various claims on the merits and determined that no further evidentiary hearing was required on any issue. Andrews v. Shulsen, 600 F. Supp. 412 (D. Utah 1984); Selby v. Shulsen, 600 F. Supp. 432 (D. Utah 1984).

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[13] The Utah Supreme Court has since applied the Wood standard to one defendant whose case, unlike petitioner's, was pending on direct appeal when Wood was decided. State v. Norton, 675 P.2d 577 (Utah), cert. denied, 466 U.S. 942 (1984).

G. Tenth Circuit Court of Appeals.

Petitioner and Selby appealed to the Tenth Circuit Court of Appeals which affirmed the denial of habeas corpus relief in Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), reh'g denied, No. 84-2781, June 8, 1987; and Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986), reh'g denied, No. 85-1021, Nov. 3, 1986.

This Court denied certiorari in Selby's case on April 27, 1987, and denied his petition for rehearing on June 22, 1987. (Selby v. Shulsen, No. 86-6303). He was executed on August 28, 1987. Andrews now petitions this Court for the third time for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE TENTH CIRCUIT'S DETERMINATION THAT NO EVIDENTIARY HEARING WAS REQUIRED ON PETITIONER'S RACE DISCRIMINATION AND FAIRNESS OF THE TRIAL ISSUES BECAUSE: (1) THE RULING IS IN ACCORD WITH CONTROLLING PRECEDENT AND THE VAST WEIGHT OF FEDERAL AUTHORITY; (2) THE DECISION BELOW TURNS ON ITS OWN FACTS; (3) PETITIONER MISSTATES ESSENTIAL FACTS; AND (4) PETITIONER PROCEDURALLY DEFAULTED THE RIGHT TO LITIGATE HIS RACE DISCRIMINATION CLAIMS ON FEDERAL HABEAS CORPUS.

The central issue before the Tenth Circuit concerning petitioner's claims of discriminatory application of the death penalty in his case and in Utah's death sentencing system as a whole was whether the District Court had properly found that the proffers Andrews made on the claims were so lacking that no evidentiary hearing was required. Andrews v. Shulsen, 802 F.2d 1265-70 (10th Cir. 1986), reviewing the District Court's holding in Andrews v. Shulsen, 600 F. Supp. 408, 425-26 (D. Utah 1984). The Tenth Circuit noted that conclusory allegations in habeas proceedings will not suffice to warrant an evidentiary hearing and that a habeas petitioner must provide supporting factual allegations (citing Bashor v. Risley, 730 F.2d 1228, 1233-34 (4th Cir.), cert. denied, 469 U.S. 838 (1984), and Townsend v. Sain, 372 U.S. 293, 312 (1963)). 802 F.2d at 1266 (1986). Andrews' proffer as to race discrimination in his particular case was

found conclusory and inadequate. Id. at 1266.[14]

His separate proffer to support his claim that Utah's death sentencing system as a whole discriminatorily imposes the death penalty on blacks or those whose victims are white was also found wholly inadequate to necessitate any evidentiary hearing, 802 F.2d at 1269-70. Although the Tenth Circuit, unlike this Court in McCleskey v. Kemp, 107 S. Ct. 1756 (1987), found that a petitioner need only proffer "an appropriately formal study that generates statistically significant results" [of disparate impact] "while accounting for the effect of other causal variables" to obtain an evidentiary hearing on this claim, 802 F.2d at 1269, the court found that Andrews' proffer did not even satisfy this lesser standard.[15] Despite the 12-year history of this case, his proffer did not even reflect a development of "the evidence that is available so as to provide some factual basis for relief" or address "other causal factors, such as degree of

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[14] To illustrate, in his Second Amended Petition to the District Court, attached as Appendix C, he stated that he was a black, male, non-Utah resident who had been impoverished all his life, and his victims were caucasians, life-long residents of Utah, and prominent members of the local community, and that "These facts actually influenced the State police, prosecutors, courts and jurors in their decision making in this case." Second Am. Pet. at 20. He failed to allege specifics to support this claim. He asserted "The jurors received racially prejudicial communications during his trial, but he failed to identify what they were. Id. at 22. He claimed that the race of the defendants were prominently mentioned in the local press and among citizens of Davis and Weber Counties but he failed to provide specifics as to when this occurred, whether the articles had racial overtones beyond identifying individuals as white or black, whether the jurors had read and been influenced by the articles, or how this factor adversely affected or prejudiced his case. He generally claimed that non-white jurors were excluded from the trial by the use of prosecutorial peremptory challenges and by jury selection techniques which excluded from jury eligibility the majority of non-white individuals in Weber and Davis Counties. Id. Again, he failed to provide specifics to support these allegations. Finally, he generally claimed that in every capital case in Utah, most of the jurors have been members of the L.D.S. Church and at the time of his trial, the Church's doctrine was that blacks were not equal to whites. This was part of his broader claim of systemic discrimination rather than an assertion of discrimination in his case. He offered no facts to establish that such factors, assuming they did exist, had actually prejudiced the jurors in his case. The allegation did not indicate that Andrews even knew the religious affiliation of the jurors in his own case.

[15] The proffer is found in Andrews v. Shulsen, 802 F.2d at 1269. it is taken from Andrews' Second Amended Petition and the Tenth Circuit even took into account more current data alleged in Andrews' brief on appeal.

aggravation involved in the murders." 802 F.2d at 1269.[16]

The Tenth Circuit separately found, after reviewing the record, that the District Court properly applied the principles of Townsend v. Sain, in determining that no further evidentiary hearing was required on petitioner's related claims as to the general fairness of his trial (i.e. adverse publicity, hostile community sentiment and trial atmosphere, refusal to grant his change of venue, continuance and sequestration motions, etc.), 802 F.2d at 1260. The District Court had concluded that the facts on these claims were adequately developed in and resolved by the state courts; that full and fair hearings were held thereon; and that other than the single incident during a meal period where one or more jurors were exposed to a napkin containing a racial slur, petitioner "made no specific factual allegations indicating a hostile trial atmosphere or that jurors were exposed to improper influences during the trial or during the period between the guilt and penalty phases." 600 F. Supp. 415-20. On this latter claim the District Court, citing Bashor v. Risley, 730 F. 2d 1228, and Boehme v. Maxwell, 423 F.2d 1056, 1058 (9th Cir. 1970), found the allegations too "conclusory and wholly devoid of specifics" to require an evidentiary hearing. 600 F. Supp. at 416. It also noted that "[o]ther than the napkin incident, petitioner has not alleged there was actual contact by any juror to publicity or improper information during the trial or between trial phases." 600 F. Supp. at 420. Finally, the

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[16] On rehearing, Andrews for the first time submitted an affidavit detailing statistical data he claimed he "would have" presented had the District Court held an evidentiary hearing. He did not attest to the accuracy of the new facts and data. His affidavit also contained facts which purportedly occurred after his appeal was taken. He attaches this affidavit as Appendix E to his petition for certiorari. None of this material was ever proffered to the District Court and was thus outside the record on appeal. Respondents nevertheless filed a counter-affidavit on rehearing refuting the reliability and validity of Andrews' new statistical data. This counter-affidavit is attached to this brief as Appendix D. Rehearing was eventually denied. As will be shown, Andrews continues to offer new factual data on certiorari which he never proffered to the lower courts under the guise that he "would have" produced it had he been given the chance. But the question before this Court is the adequacy of the various proffers Andrews actually made to the District Court, not the adequacy of evidence he now submits but never before revealed.

napkin incident was found to have been fully and fairly resolved by the state courts. 600 F. Supp. at 419-20 (citing State v. Andrews, 576 P.2d at 858-59).

Petitioner challenges these rulings claiming that his various proffers were sufficient to warrant an evidentiary hearing,[17] and that the state courts did not fully and fairly resolve some of the claims. Certiorari should not be granted because the rulings of the District Court and Tenth Circuit are in accord with controlling precedent and the great weight of authority and petitioner offers nothing to warrant a reexamination of settled principles; the decision below turns on its own facts; and petitioner misstates essential facts. Certiorari also should be denied on petitioner's dual claims of race prejudice because, despite the Tenth Circuit's ruling to the contrary,[18] Andrews procedurally defaulted these claims in the state courts and failed to establish cause for the default and prejudice resulting therefrom.

A. THE TENTH CIRCUIT FOLLOWED CONTROLLING PRECEDENT WHICH SHOULD NOT BE REVISITED; THIS CASE TURNS ON ITS OWN FACTS; AND PETITIONER MISSTATES ESSENTIAL FACTS IN AN EFFORT TO GAIN REVIEW.

The current standards for mandatory evidentiary hearings in habeas corpus proceedings were introduced in Townsend v. Sain, 372 U.S. 293 (1962),[19] and were codified in 25 U.S.C.A.

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17 Because petitioner persists in embellishing his proffered facts with new facts he never before articulated, care must be taken to limit review solely to the adequacy of the proffer he actually made to the District Court.

18 See Andrews v. Shulsen, 802 F.2d at 1266 n. 8.

19 [W]here an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.
....
We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances; If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
Id. at 312-313.

section 2254. Since Townsend, this Court has consistently held that evidentiary hearings in habeas corpus proceedings are mandatory only in limited circumstances.[20] In reliance on these standards, lower federal courts have not granted evidentiary hearings in habeas corpus cases unless petitioners articulate specific facts which have not been fully and fairly litigated in state courts, and which, if proven true, would entitle the

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[20] In Blackledge v. Allison, 431 U.S. 63 (1976), petitioner was entitled to an evidentiary hearing because his allegations were not patently false or frivolous, but were specific:

> Allison alleged as a ground for relief that his plea was induced by an unkept promise. But he did not stop there. He proceeded to elaborate upon this claim with specific factual allegations. The petition indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication.

Id. at 74-75. See also Machibroda v. United States, 368 U.S. 487 (1962) (Clark J., dissenting) (petitioner alleged in his habeas proceedings that his guilty plea to bank robbery charges was involuntary because the prosecutor instructed him not to discuss the plea with his attorney, and the judge never questioned the petitioner about the voluntariness of his plea; this Court held that because the allegations were specific, could not be proved or disproved by the record, and would entitle the petitioner to relief if true, an evidentiary hearing was proper); Fontaine v. United States, 411 U.S. 213 (1973) (an evidentiary hearing was appropriate because the record did not disprove petitioner's factual allegations which were specifically supported by medical documentation); cf. Price v. Johnston, 334 U.S. 266 (1948) (under 28 U.S.C. 2243, petitioner's conclusory allegations without specific facts justified summary dismissal of his habeas corpus petition).

petitioners to relief.[21]

Petitioner failed to meet the accepted standards for mandatory hearings. The essence of his argument is that this Court should expand the circumstances in which criminal defendants may demand from federal courts evidentiary hearings in habeas corpus proceedings. If the Court agrees that petitioner's mere allegations were enough of a showing to require the District Court to engage in an evidentiary hearing, the resulting precedent would require an evidentiary hearing in every case in which a petitioner simply concludes that there was impropriety in his trial. Notions of discretion and the doctrine ascribing a presumption of correctness to state court findings of fact, both long held views of this Court, would be vitiated. Criminal

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[21] In Bashor v. Risley, 730 F.2d 1056 (9th Cir.,) cert. denied, 469 U.S. 838 (1984), the court explained why the petitioner was not entitled to an evidentiary hearing:

> In a memorandum attached to his petition, Bashor argued that a courtroom outburst at trial demonstrated that the trial was conducted in such a hostile atmosphere that he should have been granted a change of venue. Bashor failed to set forth in his petition for a writ of habeas corpus or in the memorandum any facts concerning the alleged courtroom outburst or supporting the conclusion that he was tried in a hostile community. A federal district court is not required to grant an evidentiary hearing where the allegations in the petition are "conclusory and wholly devoid of specifics." A habeas corpus petitioner seeking an evidentiary hearing must allege actual facts which if proved would entitle him to relief.
>
> In the absence of the allegation of any facts, the district court could only speculate about the nature of the "courtroom outburst". The district court did not err in refusing to hold an evidentiary hearing where no facts were pleaded from which it could be inferred that the petitioner was tried before a hostile jury or that the courtroom disturbance had a prejudicial impact on his constitutional rights.

Id. at 1233-34. See also Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir.) cert. denied, 440 U.S. 974 (1979) (if petitioner's allegations would not entitle him to relief if proven, no evidentiary hearing is required); Ross v. Hopper, 716 F.2d 1528 (11th Cir.) cert. denied, 428 U.S. 910 (1976) (petitioner's failure to identify any evidence that would support his claim that blacks and women were underrepresented in his jury combined with the fact that his claim had been fully and fairly litigated in state court to obviate any claim to an evidentiary hearing); Birt v. Montgomery, 725 F.2d 587 (11th Cir.), cert. denied, 469 U.S. 874 (1984) (assuming petitioner's allegations to be true, they did not entitle him to relief, and did not require an evidentiary hearing); Tucker v. Zant, 724 F.2d 882 (1984) (petitioner failed to isolate any facts, the development of which would support any material claim and thus was not entitled to an evidentiary hearing); Corn v. Zant, 708 F.2d 549 (11th Cir.) cert. denied, 467 U.S. 1220 (petitioner alleged discriminatory imposition of the death penalty, but failed to identify specific acts evidencing discriminatory intent, and the habeas court dismissed his "bare" allegation because there was nothing in it which the court could evaluate).

defendants would have precedent to justify such things as the use of statistical evidence of discrimination to challenge all convictions and sentences, a proposition this Court has recently rejected.[22]

Petitioner claims that the District Court's denial of an evidentiary hearing foreclosed proof that his conviction and sentence were not based on legitimate evidence of his guilt, but on racial prejudice harbored by the jury. The Tenth Circuit was correct in affirming the District Court's summary dismissal of petitioner's habeas corpus petition, which dismissal was justified by statute and precedent. Because petitioner's allegations were disproved by the record of the trial court,[23] because as a matter of law the allegations would not merit relief even if they were true,[24] because they were fully and fairly litigated in state trial, appellate, and collateral

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[22] In McCleskey v. Kemp, 107 S.Ct. 1756 (1987), this Court explained, in rejecting statistical allegations of discriminatory sentencing:

> [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, McCleskey's claim relates to the race of the victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could--at least in theory--be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.

Id. at 1779-1780 (footnote omitted).

[23] Summary dismissal of habeas petitions is appropriate when the allegations contained therein are "patently frivolous or false." Herman v. Claudy, 350 U.S. 116, 119 (1956).

[24] See Turner v. Bass, 753 F.2d 342, 347 (1985) rev'd on other grounds, 106 S.Ct. (1986); Spinkelink v. Wainwright, 578 F.2d 582.

proceedings,[25] and because they were vague and conclusory,[26] the District Court was not bound to grant petitioner an evidentiary hearing.

Petitioner claims that among the many allegations made to the District Court in his final Second Amended Petition[27] seven factors demonstrated that, in contravention of his Sixth amendment right to a fair trial and his Fourteenth amendment right to due process, his convictions and sentences were based on race, and required the District Court to hold an evidentiary hearing. Those factors were: (1) the jury was influenced by race-oriented publicity before and during the trial and between the penalty and guilt phases of the trial, i.e., knowledge of the races of defendants and victims, and the supposed "black power" article, (2) "non-white jurors were excluded from the trial of this case by a jury selection system that barred the majority of

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[25] See Ross v. Hopper, 716 F.2d 1528 (11th Cir.) cert. denied, 428 U.S. 910.

[26] See Townsend v. Sain, 372 U.S. 293, 312 (1963); Brown v. Allen, 344 U.S. 443, 448 n. 6 (1953); Bashor v. Risley, 730 F.2d 1228, 1233-34 (9th Cir.), cert. denied, 469 U.S. 838 (1984); Green v. Wingo, 454 F.2d 52, 54 (5th Cir. 1972); Boehme v. Maxwell, 423 F.2d 1058 (9th Cir. 1970); Schlette v. People, 284 F.2d 827, 833-34 (9th Cir.), cert. denied, 366 U.S.1 940 (1961); Dunn v. California, 401 F.2d 340, 342 (9th Cir. 1968).

[27] In his petition for certiorari, with no explanation besides the deceptive introductory phrase "he would have shown", petitioner submits new support for his claims of jury discrimination which he never presented to the lower state or federal courts. See petition page 4 (characterizing news coverage of defendant's shaking his fist at an eye-witness as coverage of a "black power" symbol); page 7 (first allegation that any of petitioner's jurors were members of the L.D.S. Church); page 7 (first allegation that statutory property requirements barred blacks from serving on juries in Davis and Weber Counties); page 7 (first allegation that the prosecutor intended to bar blacks from serving on jury); page 8 n. 3 (documentation of L.D.S. Church's purportedly anti-black doctrines; page 9 (raising for the first time an implication that the stick figure and message drawn on the napkin were drawn by a juror and seen by all of the jurors); page 16 (raising for the first time petitioner's claim that the presence and behavior of spectators and news reporters created a "carnival-line atmosphere"). In his Second Amended Petition, the napkin incident was the only race-specific factual allegation; in the alchemy of his Petition for Certiorari, all of petitioner's prejudicial publicity allegations have become racial issues. Although this new support bears the same fatal characteristics as petitioner's claims that were presented to the lower courts (they are vague, conclusory, and an insufficient bases for relief even if proven true), this Court is not required to evaluate new material raised for the first time on certiorari in deciding whether or not to grant certiorari. Irvine v. California, 347 U.S. 128, 129 (1954).

non-white citizens of Davis and Weber counties", (3) "the only black person called to sit on the jury was excused by the prosecutor, who employed a peremptory challenge to ensure that the jury would be all white", (4) "the jury . . . was affected by religious convictions that were prejudicial to black persons", (5) the jurors were exposed to manifestations of anti-Black community sentiment, i.e., the note saying "Hang the Niggers", (6) the imposition of the death sentence on black as opposed to white defendants is vastly disproportionate. Petition for Certiorari pp. 7-17.

The conclusion that petitioner expected the courts to infer and expects this Court to infer from these various factors is that his jury based its convictions and sentences on racial prejudice.

Yet, this conclusion is readily disproved by the record. As the Tenth Circuit observed, one of petitioner's co-defendants, Keith Roberts, was evaluated by the same jury that convicted and sentenced petitioner, was equally subjected to the media coverage that petitioner was subjected to, and was equally threatened by the napkin incident, Roberts was also black and was the only defendant represented by a black attorney (363), yet he was not convicted of murder charges, and thus not sentenced to death. See Andrews v. Shulsen, 802 F.2d at 1266.

Moreover, during the course of the voir dire, potential jurors were questioned by the judge, prosecutor, and defense attorneys about racial prejudice. One juror held such prejudices and was excused from serving (1013), but every other potential juror that was asked about racial prejudice denied harboring any such feelings, (112, 113, 122, 133, 142, 147, 165, 169, 190, 197, 198, 212, 227, 238, 240, 280, 300, 323, 345, 363, 365, 383, 398, 410, 412, 421, 443, 457, 483, 495, 508, 521, 540, 568, 580, 661, 672, 681, 721, 733, 764, 821, 867, 962, 1019, 1035, 1058, 1089, 1105, 1213, 1248, 1269, 1297). See Andrews v. Shulsen, 802 F.2d at 1266, 1270 ("prosecution and defense received ample opportunity to question prospective jurors about racial prejudice (citing Turner v. Murray, 476 U.S. 1 (1986)); and trial court

conducted extensive voir dire "on the issue of race to ensure an unprejudiced jury.")

1. PUBLICITY BEFORE AND DURING THE TRIAL AND BETWEEN THE GUILT AND PENALTY PHASES HAD NO EFFECT ON PETITIONER'S JURY.

Petitioner's excerpts from the voir dire, which he uses to demonstrate that his jury was affected by extensive publicity, are decidedly selective. The first (771-84), third (1230-52), fifth (751-70), and seventh (1282-1310) jurors quoted in the first full paragraph of page 15 of the petition agreed to serve impartially (771-84). The second juror quoted was not empaneled. The fourth juror quoted had no strong feelings about the case (377-89). The sixth juror quoted was concerned that the defendant be provided adequate counsel (T. 516-32).

Of the twelve jurors and one alternate that were actually impaneled, eleven stated during voir dire that they had not formed or expressed any opinions concerning defendants' guilt (1090, 1093, 1098; 460, 461; 1239; 772; 378, 381; 317, 322, 323; 1182, 1184; 393; 523, 1343; 757, 758). The only juror who had formed an opinion was the only juror challenged for cause by defense counsel (1309, 1105, 472, 1253, 784, 389, 332, 1191, 400, 532, 1356, 770), but the court stated that his sophistication and calmness indicated that he could serve as an impartial juror (1283, 1310). All of he jurors and the alternate stated that they could disregard publicity and presume the defendants innocent (1283, 1285, 1286, 1293, 1296, 1300; 1091, 1094, 1096; 458, 466, 467; 1237, 1243, 1252; 775, 776, 381; 326; 1183, 1188; 391, 399; 523, 526; 1355; 754, 758, 763). The extensive voir dire and repeated admonitions to the jury about avoiding prejudical contacts during the trial[28] support the Tenth Circuit and District Courts' determinations that the issue of prejudicial

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28 Almost thirty times during the voir dire alone, the trial judge instructed all of the potential jurors to avoid outside influence and premature and prejudiced decisionmaking (66, 102, 173-74, 176, 246, 251, 252, 254, 332-33, 415, 416, 552-53, 555, 632, 633-34, 747-48, 750, 815-16, 947, 950-51, 1-24-25, 1145, 1148, 1227-28, 1334, 1337-38, 1366, 1463-64, 1466). Such admonistions were repeated throughout the trial, and between the guilt and penalty phases the jurors were again admonished about contact with outside influences and at least seven jurors were expressly ordered not to go to work (4112-14).

community sentiments was correctly decided by the state courts.[29] Furthermore, jurors in petitioner's case even contacted the trial court after their service was complete, inquiring about the propriety of their discussing the case now that it was over (4310).

As a matter of law, in order to overturn his conviction on the grounds of prejudicial publicity, petitioner would have to show that the coverage of his case was inherently prejudicial or he would have to demonstrate the actual prejudice of his jurors.[30] Comparing the facts alleged by petitioner to those in Sheppard v. Maxwell, 384 U.S. 723 (1963); Rideau v. Louisiana, 373 U.S. 723 (1963), and Estes v. Texas, 381 U.S. 532 (1965), it is apparent that the coverage of petitioner's trial was not inherently prejudicial.[31] He likewise failed to allege or show actual prejudice.[32]

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29 Jurors are presumed to have followed the admonsitions of the trial judge. United States v. Hall, 536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976). See also Andrews v. Shulsen, 600 F. Supp. at 420 (summary of precautionary measures taken by trial court).

30 Murphy v. Florida, 421 U.S. 794 (1975).

31 See State v. Pierre, 572 P.2d 1338, 1350 (Utah), cert. denied 439 U.S. 882 (1978).

The so-called "black power" article might come closest to constituting inflammatory media assuming petitioner's characterization of it were true. However, the record paints a different picture. At the outset of the sentencing hearing, Andrews moved for a mistrial claiming news over the weekend reported that he had raised his fist and shook it at a state's witness when the verdict was read and that he and a co-defendant were playing poker, laughing and joking while waiting for the verdict (4120). The incident was never characterized as involving a "black power" gesture as petitioner now chooses to characterize it. Nor was it alleged that the article had any racial overtones. Andrews did not claim that the jurors had actually read the article or ask that they be questioned on the matter (4121), and the prosecutor was willing to call numerous witnesses to establish that the content of the article was indeed accurate (4122). On direct appeal, Andrews merely asserted that the jury should have been sequestered between the guilt phase and penalty phases, but offered no specifics to establish that actual prejudice had ever occurred. See Andrews' brief in State v. Andrews, Utah S. Ct. No. 13902 at 4-7. Because this is the only piece of inflammatory media proffered by petitioner, it did not put him in a quantitative position comparable to those in Sheppard, Estes, or Rideau. And because he failed to allege that any juror was exposed to it, it does not qualify as proof of actual prejudice.

32 See Irwin v. Dowd, 366 U.S. 717, 727 (1961); State v. Andrews, 576 P.2d 857 (Utah), cert. denied, 439 U.S. 857 (1978).

Prejudicial media coverage before and during the trial was considered at the trial in motions for change of venue, continuance, jury sequestration, and mistrial (65, 71, 73, 154, 156, 212, 1356-1357, 148, 161-63; 208; and 1367-69, 4114-4115; 2455, 3253) and on appeal.[33] In his habeas proceedings, petitioner had to demonstrate manifest error of the trial court in order to succeed in his claim that the jury was infected by prejudicial publicity.[34] The Utah Supreme Court, Federal District Court, and Tenth Circuit all found that the media coverage of petitioner's case was factual and not inflammatory.[35] In denying petitioner's request for an evidentiary hearing, both the District Court and the Tenth Circuit Court of Appeals, took note of the Utah courts' dispositions of these issues,[36] which are entitled to a presumption of correctness,[37] and which made it unnecessary for the District Court to hold an evidentiary hearing in petitioner's federal habeas corpus case.[38]

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[33] State v. Andrews, 574 P.2d 709, 710-13 (Utah) cert. denied, 439 U.S. 982 (1978); State v. Pierre, 572 P.2d 1338, 1348-50 (Utah) cert. denied, 439 U.S. 982 (1978).

[34] Patton v. Yount, 467 U.S. 1025 (1984). This Court has previously held that unless prejudicial community sentiments about a criminal case are so pervasive as to defy any claim that a jury in that area could serve without bias, community sentiments are not to be imputed to jury members. Petitioner would have this court expand the rule to include cases like his, where there is no more than speculation about how jury members might have been effected by community sentiment. Petitioner would also have this court rule that the lack of concern for community sentiment expressed by the jurors in his case should be ignored. To rule in such a way would seriously compromise the jury system. Voir dire and the juror's oath would be rendered meaningless.

[35] Dobbert v. Florida, 432 U.S. 282 (1977) explains that juror contact with non-inflammatory media does not justify a reversal of the verdict. See also Murphy v. Florida, 421 U.S. 794 (1975) (jury verdict not distrubed unless media coverage is inflammatory).

[36] Andrews v. Shulsen, 600 F. Supp. 408; Andrews v. Shulsen, 802 F.2d 1256.

[37] 28 U.S.C. § 2554(d); Sumner v. Mata, 449 U.S. 539 (1981); Patton v. Yount, 467 U.S. 1025 (1984); Ball v. Ricketts, 779 F.2d 578 (10th Cir.), cert. denied, 107 S. Ct. 236 (1986); Hurt v. Page 355 F.2d 169, 170 (10th Cir. 1966); Townsend v. Sain, 372 U.S. 293, 318 (1963); Wainwright v. Witt, 469 U.S. 412 (1985).

[38] 28 U.S.C. § 2254(d); Maxwell v. Turner, 411 F.2d 805, 807 (10th Cir. 1969); Sumner v. Mata, 449 U.S. 544, 547 (1981); Jolly v. Crouse, 411 F.2d 808, 809 (10th Cir. 1969).

Petitioner implies that media coverage which factually stated the races of defendants and victims must somehow have produced a racist verdict, but petitioner failed repeatedly to proffer enough facts to suggest that he could, if given the chance, prove his jurors were exposed to or affected by this coverage while they were serving in his case. As noted in the state court decisions and the opinions if the District and Tenth Circuit Courts, under most circumstances, prejudicial media coverage is not imputed to jurors without cause.[39] He claims now for the first time that a carnival-like atmosphere prevailed at his trial, but fails to provide specifics about this atmosphere or about the specific impact it had on the jurors.[40] The District Court was not obligated by petitioner's vague allegations of prejudicial publicity to grant petitioner an evidentiary hearing.[41]

2. UTAH'S JURY SELECTION SYSTEM DID NOT BAR NON-WHITE CITIZENS FROM JURY SERVICE.

Petitioner claims for the first time on certiorari that the majority of blacks in Davis and Weber Counties were barred from serving on his jury because under "former § 78-16-17 U.C.A. 1953", the jurors at the time of his trial had to be property

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[39] Murphy v. Florida, 421 U.S. 794 (1974); Patton v. Yount, 467 U.S. 1025 (1984).

[40] Under Smith v. Phillips, 455 U.S. 209, 217 (1982), a defendant raising such a claim must show specifically how alleged courtroom disturbances actually disrupted his jurors.

[41] Cf. Hopkinson v. Shillinger, 645 F. Supp. 374 (D. Wyo. 1986):

> [I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.
>
> Petitioner in the instant case argues that a general atmosphere of anxiety and fear was present throughout his trial and that abundant evidence of this exists in the transcript of voir dire. Petitioner has attached a number of exhibits in support of his assertions. The affidavits petitioner relies on are couched in general conclusionary terms and contain many hearsay statements. . . . The affidavit . . . does not refer to any specific security measures. . . . .
>
> The affidavit . . . is vague and conclusionary. There is no indication of any exposure to the jury of any abnormal security measures.

Id. at 410.

owners "on the assessment roles." Petition p. 7 n. 2. Petitioner not only miscites the pertinent statute, but flagrantly misstates it. No doubt he is referring to Utah Code Ann. § 78-46-17 (Supp. 1973), in effect at the time of his trial, which provided in pertinent part:

> It shall be the duty of the jury commissioners . . . to select from the names of the legal voters of the county for the current year a written list of names from which the grand and trial jurors shall be drawn to serve in the district court of such county during the succeeding year.

(Emphasis added.) The requirement that the legal voters be "on the assessment rolls" of the county was repealed in 1971 (three years before petitioner's trial). Laws of Utah 1971 (1st S.S.), Ch. 8 § 1. The 1973 provision was thus consistent with Utah Code Ann. § 78-46-8 (1953), which rendered persons competent to serve as jurors if they were "taxpayers of the state." Accordingly, the trial judge stated twice during the voir dire that if a potential juror paid sales taxes, he was statutorily qualified to serve (20, 677). Thus, petitioner's second allegation, that blacks were excluded from his jury by statutory property ownership requirements, is exposed as baseless by examining the law and the record.

In support of his contention that this new allegation of statutory discrimination justified the granting of an evidentiary hearing in the District Court, petitioner cites Vasquez v. Hillery, 106 S. Ct. 617 (1986). In Vasquez, however, this Court, quoting Picard v. Connor, 404 U.S. 270, 276 (1971), observed: "Under standards established by this Court, a state prisoner may initiate a federal habeas petition '[O]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated. . . '". Vasquez at 620. Vasquez defeats, rather than supports petitioner's claim.

Petitioner's false claim that the statutory scheme at the time of his trial, effectively excluded most blacks from jury service is also controlled by Duren v. Missouri, 439 U.S. 35 (1979) and McCleskey v. Kemp, 107 S. Ct. 1756 (1987). In order to challenge the composition of his jury under the Sixth

Amendment fair-cross-section requirement, petitioner was required to show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren at 364. Petitioner never proffered to any court any numerical proportions of blacks to non-blacks in Davis and Weber Counties, or any numerical proportions of blacks to non-blacks in Davis and Weber County juries, and thus never met the second prong of Duren. He merely does again what he has done throughout the appeals and post-conviction process; he states conclusions he thought were facts (and in this instance, clearly erroneous facts), conveniently argues from his conclusions relying on them as statements of fact, and asks the courts to agree. That the courts have not granted the relief petitioner has sought is simply proof that every court that has dealt with petitioner's claims has seen through this slight of hand.

Not only did petitioner fail to show that blacks were unrepresented in Davis and Weber County jury panels, he failed to show in any proffer that their alleged underrepresentation was the result of systemic exclusion. In McCleskey, this Court explained that in alleging systemic discrimination, a petitioner must allege intent to discriminate:

> He appears to argue that the State has violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. But "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

McCleskey at 1769, quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (footnote and citation omitted). Under that standard, petitioner failed to state a claim. Even if his allegations were accepted as true,

because he failed to allege legislative intent to discriminate in the non-existent jury selection statute, McCleskey and Feeney foreclose his argument.

Petitioner expected the lower court to accept his conclusory allegation of systemic barring of blacks from jury service without petitioner's providing any statistical proof that the proportion of whites to blacks on the jury did not correlate with the proportion of whites to blacks in the overall population. Petitioner implies that all-white juries are incapable of treating black defendants fairly, but fails to show that any juror who convicted and sentenced him was racially motivated. This vague and conclusory allegation did not merit an evidentiary hearing under Price v. Johnson, 334 U.S. 266 (1948); Machibroda v. United States, 368 U.S. 487 (1973); Fontaine v. United States, 411 U.S. 213 (1973); and Blackledge v. Allison, 431 U.S. 63 (1976).

3. THE ONLY BLACK IN THE VENIRE WAS NOT EXCLUDED FROM THE JURY BY THE PROSECUTOR'S PEREMPTORY CHALLENGE.

Petitioner's allegation that the prosecution intentionally barred blacks from participating on the jury is also disproved by the record. Nothing in the record indicates that Ms. Zecker, the juror mentioned in petitioner's allegation, was black. The prosecutor challenged her for cause because she was religiously unable to impose the death penalty (1113, 1121),[42] but after some dispute, the trial judge accepted her as a legal juror (1179).

Prospective juror Lords was black (271), and although he admitted to having close ties in the black community where the crime occurred (277) and admitted that his father was the city director of the NAACP (278), the prosecutor passed him for cause (284), while defense counsel challenged him for cause (282, 284). After hearing arguments from defense counsel, the prosecutor

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[42] A prospective juror may be challenged for cause if his convictions about the death penalty will substantially impair his performance a a juror. Lockhart v. McCree, 476 U.S. 162 (1986). Thus, if Batson v. Kentucky, 106 S. Ct. 1712 (1986), were applied to this case, the prosecutor had a neutral reason for challenging this juror. See Batson at 1725.

expressed concern about avoiding reversible error, and joined the defense attorneys in a stipulation to excuse Lords from service (282). This again, is an example of petitioner's repeated mischaracterization of facts which are readily discoverable from the record. Thus, there was no Batson error here. Moreover, Batson has no retroactive application to cases already final. Allen v. Hardy, 106 S. Ct. 2878 (1985).

4. PETITIONER MADE NO PROFFER BELOW THAT THE JURY IN THIS CASE WAS AFFECTED BY ANTI-BLACK RELIGIOUS CONVICTIONS. NOR DOES THE RECORD SUPPORT SUCH A CLAIM.

In his proffer to the District court, petitioner claimed without citing numbers or statistics that in Utah's history of capital cases, most jurors have been members of the L.D.S. Church. He proffered no evidence of the religious affectations of his jurors.[43] His present claim, raised for the first time on certiorari[44] that the members of his jury were mostly L.D.S., and affected by religious anti-blacks sentiments, is a bold misstatement, unsupported by fact, and is disproved by the record. Not only did the jury fail to convict black co-defendant Roberts, but during the voir dire several jurors responded negatively when they were asked if their religious or fraternal affiliations would prejudice their performance as jurors (161, 238-39, 261-62, 778). Only one juror identified himself as belonging to the L.D.S. Church and he stated that his religious perspectives would not prejudice his performance as a juror (839).

Petitioner's belated claim of religious-racial prejudice, like his other claims, fails to meet the requirement of being case-specific. He implies that jurors living in an area

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[43] During summation at sentencing, however, petitioner's counsel expressly stated "We didn't ask you [the jurors] when we voir dired the jury, what religion you belonged to, and I don't know, but I would assume some of you are Christians, some of you may not be" (4298).

[44] See n. 14. In his second amended petition to the District Court, petitioner merely asserted as part of his systematic race discrimination claim that "In every capital case in the State of Utah . . . the sentencing jurors have been white, and most have been members of the Church of Jesus Christ of Latter Day Saints." He offered no facts specific to his own case as to the religious makeup of the jury. See Andrews' Second Am. Pet., paragraph 16E, at 21 (attached as Appendix C).

populated by members of what he simply concludes is a racist church are incapable of treating black defendants fairly, but failed in any proffers to show that any juror who convicted and sentenced him was committed to or affected by any religious doctrine. He also failed to proffer any data regarding purported doctrines of the L.D.S. Church. He offers limited data for the first time on certiorari. Petition at 8 n. 3. See n. 44, supra.

He cites Turner v. Murray, 476 U.S. 1 (1986) for the proposition that the District Court should have granted him a hearing. In Turner, this Court vacated the petitioner's death sentence because the voir dire of his jury was inadequate: the trial judge refused to ask specific questions regarding racial prejudice. This Court explained that capital defendants have no standing to complain of the absence of race-specific questions during voir dire unless the trial court refuses their specific requests that such questions be asked. In this case, petitioner's attorney was allowed to voir dire the jurors directly, and thus petitioner has no standing to challenge the voir dire. The judge did not refuse race-specific questions, but asked them personally, as did the prosecutor and defense attorneys.

5. THE NAPKIN INCIDENT WAS PROPERLY DEALT WITH BY THE TRIAL COURT AND WAS INSUFFICIENT, IN THE CONTEXT OF THE ENTIRE RECORD, TO RAISE A REASONABLE POSSIBILITY THAT THE JURY'S VERDICT WAS BASED ON ANTI-BLACK COMMUNITY SENTIMENT.

As noted above, the jury's failure to convict and sentence to death petitioner's black co-defendant, Roberts, disproves petitioner's claim that the jury was acting on racial prejudice, rather than on evidence. Inasmuch as the transcript of the napkin incident effectively rebuts petitioner's new and unsupported contention that all of the jurors may have seen the napkin (R. 2450), the unanimous jury verdict convicting petitioner further serves as a record-based rebuttal to the allegation that the jury's exposure to the napkin prejudiced petitioner's case.

Petitioner now objects to the trial court's treatment of the napkin incident, decrying the judge's failure to question jurors about the incident and his "general' and "vague" directive

to the jurors to "ignore communications from foolish people." Petition p. 10. Questioning individual jurors is not mandated in every case of juror contact with outside prejudice,[45] and there can be no doubt that the jurors who did see the napkin knew what the trial court was referring to in his admonition, which immediately followed the incident (2456).

Petitioner did not request a hearing with the jurors at the time of trial. This Court has previously held that belated allegations of implied juror bias such as this one will not be accepted when the defendant had the opportunity but failed to show actual prejudice. See Smith v. Phillips, 455 U.S. 209, 216 (1982) ("The Court rejected this claim of implied bias, noting that Dennis was 'free to show the existence of actual bias' but had failed to do so," quoting Dennis v. United States, 339 U.S. 162, 171-72 (1950)).

Petitioner cites Tanner v. United States, 55 U.S.L.W. 4942 (1987); Smith v. Phillips, and Remmer v. United States, 347 U.S. 227 (1954) in claiming that the napkin incident called for an evidentiary hearing. In Tanner this Court upheld the lower court's refusal to grant an evidentiary hearing to investigate allegations of juror drug use and inebriation. In Smith, a juror submitted an employment application to the District Attorney's Office during the course of the trial. When the prosecuting attorneys became aware that their applicant was also serving as a

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[45] United States v. Albert, 595 F.2d 283 (5th Cir.), reh'g. denied, 599 F.2d 449, cert. denied, 444 U.S. 963 (1979), explains that:

> Prejudicial private communications between jurors and third persons are, of course, prohibited . . . However, if, by means of a hearing or other investigation by the trial court, the private communications are shown to be harmless, a new trial is not required.

Id. at 290 (emphasis added).

Petitioner's claim for a post-trial evidentiary hearing to inquire into the prejudicial impact of the napkin incident on the deliberations of the jury flies in the face of "'controlling considerations of public policy,' . . . [which] dictate that jurors 'cannot be called . . . to testify to the motives and influences that led to their verdict.'" McKleskey v. Kemp, 107 S. Ct. 1756, 1765 (1987), quoting McDonald v. Pless, 238 U.S. 264, 267 (1915) and Chicago, B. and Q. R. Co. v. Babcock, 204 U.S. 585-93 (1907).

juror in one of their cases, they elected not to contact the juror and not to inform the trial court. In this case, the issue did not involve personal juror and prosecutor interest, as it did in Smith, and the defense, prosecution, and the court were all aware of the incident.

In Smith, this Court explained that in Remmer, a juror was offered a bribe by a third party in exchange for a verdict, and the trial judge and prosecutor failed to inform defense counsel of the incident and F.B.I. investigation. The Court based its decision on the seriousness of the bribe and the impact that the secrecy of the investigation must have had on the juror. Smith, 455 U.S. 215. In this case, the message on the napkin did not involve personal juror interest, and the investigation ended when all of the jurors were instructed to examine their place settings for other messages (2451), and they were subsequently instructed to ignore foolish communications (2456).

Petitioner's reliance on Batson v. Kentucky, 476 U.S. 79 (1986); Turner v. Murray, 476 U.S. 1 (1986); and Ristaino v. Ross, 424 U.S. 589 (1976) is also misplaced. These cases all deal with racial considerations in jury selection.

The napkin incident, petitioner's only factual allegation specific to his trial presented to the lower courts, was considered at the trial immediately after the incident when the bailiff was interviewed (2445-57), in motions for mistrial (2455, 3252), and on direct appeal.[46] In denying petitioner's request for an evidentiary hearing, both the District Court and the Tenth Circuit took note of the Utah courts' dispositions of

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46 State v. Andrews, 576 P.2d 857 (Utah) cert. denied, 439 U.S. 882 (1978):

> We conclude that no actual prejudice was demonstrated showing that the jury was influenced adversely and there was no showing that sequestration would have eliminated this incident. Indeed though the jury was not generally sequestered, it was sequestered at this recess. We believe that the professional manner in which this unfortunate incident was handled by the jurors, the bailiff, and the court negates the probabilty of actual prejudice.

Id. at 859.

these issues,[47] which are entitled to a presumption of correctness.[48] Because the merits of petitioner's napkin incident allegation were adjudicated fully and fairly in the state courts, there was nothing to merit a further evidentiary hearing in federal habeas corpus proceedings.[49]

6. PETITIONER'S CLAIM OF DISPROPORTIONATE IMPOSITION OF DEATH PENALTY ON BLACK DEFENDANTS FAILS UNDER McCLESKEY.

In order to avoid the impact of the Court's decision in McCleskey, petitioner recharacterizes his statistical argument for racial conviction and sentencing, claiming that he does not seek to establish discrimination itself, but seeks to show that the entire capital sentencing scheme in Utah fails to protect defendants from discrimination. See Petition at 11, n. 5. His statistics supposedly demonstrate that juries are racially motivated, but petitioner's recharacterization of his argument is a distinction without a difference. Aside from citing a nonexistent statute, petitioner does not identify any part of the capital sentencing system that, if changed, would have prevented his jurors from convicting and sentencing him. In any event, this Court rejected a similar argument in McCleskey:

> In its broadest form, McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of appeals, and every other court that has considered such a challenge, that his claim must fail.

Id. at 1766.

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[47] Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984); Andrews v. Shulsen, 802 F.2d 1256.

[48] 28 U.S.C. § 2554(d); Sumner v. Mata, 449 U.S. 539 (1981); Patton v. Yount, 467 U.S. 1025 (1984); Ball v. Ricketts, 779 F.2d 578 (10th Cir.), cert. denied, 107 S. Ct. 236 (1986); Maes v. Patterson, 401 F.2d 200, 201 n. 4 (10th Cir. 1968); Hurt v. Page, 355 F.2d 169, 170 (10th Cir. 1966); Townsend v. Sain, 372 U.S. 293, 318 (1963); Wainwright v. Witt, 469 U.S. 412 (1985).

[49] 28 U.S.C. § 2254(d); Maxwell v. Turner, 411 F.2d 805, 807 (10th Cir. 1969); Sumner v. Mata, 449 U.S. 544, 547 (1981); Jolly v. Crouse, 411 F.2d 808, 809 (10th Cir. 1969).

In similar fashion, petitioner claims that his proffer of statistical proof differed from McCleskey's because his own statistics showed a pattern of discrimination against black defendants. The Baldus study used by McCleskey "divided the cases according to the combination of the race of the defendant and the race of the victim." McCleskey at 1763. The district court and circuit court evaluating McCleskey's claims dealt with both the race of the defendants and the victims, id. at 1764, 1765. This Court summarized McCleskey's claims thusly:

> He argues that race has infected the administration of Georgia's statute in two ways: persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers.

Id. at 1766.

Regardless of petitioner's insistence on characterizing his statistical argument as one focused on the system, see n. 23, he implies that statistics[50] about defendants convicted and sentenced in other cases could be used to show that his jurors acted in accordance with a trend of racial prejudice, but he failed in every proffer to show that he could prove that his jurors were actually motivated by racial considerations. Historically, lower courts have not accepted similar statistical proof of discrimination, holding that statistical proof of discrimination can substitute for a habeas corpus petitioner's normal burden of alleging case-specific facts only when those statistics give rise to only one inference.[51] Even under less restrictive Tenth Circuit standards, i.e. recognizing as valid

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[50] The District and Circuit Courts found petitioner's statistical proof wanting in both legal and scientific ways. See Andrews v. Shulsen, 600 F.Supp. at 426; Andrews v. Shulsen, 802 F.2d at 1269-70.

Compare the complex analysis involved in the Baldus study described in McCleskey at 1763-64 with the materials proffered by petitioner. See also Affidavit of Dr. Harry E. Bluhm (offered by the State on rehearing in the Tenth Circuit and attached as Appendix D) for discussion of the scientific and ethical shortcomings of petitioner's attempt at statistical argumentation.

[51] Moore v. Blackburn, 806 F.2d 560, 564 (5th Cir.) cert. denied, 107 S.Ct. 1988 (1987); Watson v. Blackburn, 798 F.2d 872 (5th Cir.), cert. denied, 107 S.Ct. 1984 (1987); Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir.), cert. denied, 459 U.S. 882 (1982); Spinkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

Eighth Amendment claims statistical patterns of discrimination when the statistics give rise to more than one inference,[52] petitioner failed to state a claim.

Semantics aside, petitioner's claim that his statistics support a challenge to the capital punishment system in Utah is controlled by McCleskey, which "rejected the argument that 'a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that . . . [a] capital sentence is unconstitutional under the Eighth or Fourteenth Amendments.'" Petition for Certiorari p. 6, quoting McCleskey v. Kemp, 107 S. Ct. 1756, 1761 (1987).

In summary, presumptions of state fact-finding validity in habeas cases reflect deference for principles of comity.[53] This Court rejected McCleskey's statistical challenge to his sentence because he was attacking "decisions at the heart of the State's criminal justice system. '[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through

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[52] The Tenth Circuit did not specifically delineate their standard for accepting statistical arguments:

> We need not decide precisely what degree of disparate impact would warrant condemning a capital punishment system because Andrews has not made a sufficient showing to call into question the overall fairness of the statutory scheme under which he received the death penalty. Constitutionally adequate procedures to direct and limit discretion in imposing the death penalty raise a presumption that a capital punishment law operates evenhandedly. . . . This presumption must be rebutted by proof of either random or systematically disparate sentencing patterns. Such proof should generally consist of an appropriately formal study that generates statistically significant results while accounting for the effect of other causal variables.
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> [A] small population is not the only problem with Andrews' proffer. He has not developed the evidence that is available so as to provide some factual basis for relief. More importantly, Andrews has failed to address whether other causal factors, such as the degree of aggravation involved in the murders, might account for the sentences of the seven individuals now on Utah's death row.

Andrews v. Shulsen, 802 F.2d 1256, 1269.

[53] See Sumner v. Mata, 101 S. Ct. 764 (1981) ("This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts," id. at 769.

criminal laws against murder.'" McCleskey at 1769, quoting Gregg v. Georgia, 428 U.S. 153 (1976). Inasmuch as the lower federal courts relied heavily on state court adjudication of two of petitioner's allegations raised in his habeas petition, if this Court were to grant certiorari in this case, it would send a signal to other federal courts that they should independently evaluate all state court findings of fact, resulting in duplicative procedures and federal antagonism.[54]

Finally, in light of the jury's treatment of co-defendant Roberts, it is evident that the absence of blacks on the jury is not the best explanation for petitioner's conviction and sentence; overwhelming evidence at trial supported the jury's verdict of his guilt. Cf. McCleskey at 1769 ("a legitimate and unchallenged explanation for the decision is apparent from the record; McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty").

Contrary to his assertion, during the twelve years his case has taken to work its way glacially through the post-conviction process, petitioner had countless opportunities to make proffers of facts and evidence of sufficient quality and merit to get past what Townsend v. Sain requires before an evidentiary hearing is held. He has not made such a proffer because he could not. He has never been able to do anymore than offer conclusions and speculation masked as fact. As the State's reply demonstrates, petitioner has not been candid when it comes to the record, or the issues it applies in his case. The record and the law do answer his claims. They have always left him without a basis for relief despite what he has tried to do with

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54 In addition to minimizing the "friction" between the state and federal courts, the limited nature of the review provided by § 2254 also serves the interest that both society and the individual criminal defendant have "in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

Sumner v. Mata, 101 S.Ct. 764, 771 n. 3 (1981), quoting Sanders v. United States, 373 U.S. 1, 34-35 (1963).

them. He has not done any better in his petition to this Court. He has offered no argument either on the facts or the law which would warrant this Court's consideration. The decision of the Tenth Circuit on the issues related to petitioners claims based on race, and the fairness of his overall trial should be allowed to stand.

B. PETITIONER IS PROCEDURALLY BARRED FROM LITIGATING HIS CLAIM OF RACE DISCRIMINATION IN HIS OWN CASE BECAUSE IT WAS NEVER PRESENTED TO THE STATE COURTS; PETITIONER IS ALSO PROCEDURALLY BARRED FROM LITIGATING HIS SYSTEMIC RACE DISCRIMINATION CLAIM BECAUSE HE WAS FOUND BY THE STATE COURTS TO HAVE PROCEDURALLY DEFAULTED THE CLAIM UNDER STATE LAW BY NOT TIMELY RAISING IT ON DIRECT APPEAL, AND BY PROVIDING THE STATE HABEAS COURTS WITH ONLY CONCLUSORY ALLEGATIONS IN SUPPORT OF THE CLAIM.

The Tenth Circuit, without distinguishing between petitioner's two distinct race discrimination claims, found that the Utah Supreme Court "considered the merits of the argument in the first state habeas case, notwithstanding the prior procedural default" (citing Andrews v. Morris, 607 P.2d at 822, 825). Andrews v. Shulsen, 802 F.2d at 1266 n. 8.

It then concluded that:

> If a state court has reached the merits of a claim, a federal habeas court may do the same despite the existence of a state procedural bar. See e.g., Morishita v. Morris, 702 F.2d 207, 209 (10th Cir. 1983); see also County Court of Ulster County v. Allen, 442 U.S. 140, 142-54, 99 S. Ct. 2213, 2219-23, 60 L.Ed. 2d 777 (1979).

Id. The Tenth Circuit first erred in applying this analysis to petitioner's claim of race discrimination specific to his own case because, as will be show infra, petitioner never asserted such a claim in the state courts. Secondly, the court misread the Utah Supreme Court's opinion in Andrews v. Morris, in concluding that it reached the merits of the systemic discrimination claim "despite the existence of a state procedural bar." That opinion reflects that the Utah Supreme Court expressly found and invoked Utah's doctrine of procedural default on the issue. 607 P.2d at 818-21. It then reached the merits only in the alternative as dictum. 607 P.2d at 825. The weight of authority is that in such instances, the door is not opened for federal habeas review.

1. PETITIONER NEVER PRESENTED THE STATE COURTS WITH HIS CLAIM THAT HIS CONVICTIONS AND DEATH SENTENCES WERE THE RESULT OF RACE DISCRIMINATION IN HIS PARTICULAR CASE.

Petitioner never asserted in the state courts that the jury's guilt and sentencing verdicts in his own case were the result of race discrimination.[55] Moreover, as previously shown, other than the single napkin incident, he never presented any of the other factual allegations he now offers in his petition for certiorari in support of his claim of racial bias.

At trial, he made no claim that the jury was in fact influenced by racial considerations. Specifically, he made no claim (1) that there was race bias in the local jury selection system; (2) that the prosecutor improperly used peremptory challenges to exclude blacks from the jury; (3) that the jurors were influenced by religious doctrines prejudicial to blacks or were in any way racially prejudiced against him; (4) that there were manifestations of anti-black community sentiment which influenced the jurors (other than the "napkin incident"); (5) that media reporting prior to or during trial had racial overtones or that jurors had actually been exposed to such improper media publicity or other improper influences,[56] or (6) that the atmosphere at the trial was racially charged. The claims raised at trial as to the fairness of the proceedings simply were not based upon racial allegations. Only questions of the need for change of venue, sequestration, or continuance due to general pretrial and trial publicity were raised.

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[55] Petitioner will likely argue that because he raised the napkin incident in state court, he preserved the race discrimination issue. However, petitioner offered the napkin incident as part of a separate claim that the trial court erred by failing to sequester the jurors to protect them from prejudicial outside influences. See Pierre's brief on direct appeal, Point V at 39 which Andrews' joined (attached as Appendix E). Petitioner never claimed, as he does now, that he was denied his rights under the Eighth and Fourteenth Amendments because the jurors in his case, in fact, acted out of racial bias, nor did he offer the napkin incident in support of such claim.

The Utah Supreme Court accordingly only dealt with the issue in the context of the sequentation issue and determiend that because the incident occurred during the jury's joint luncheon recess, "sequestration would not have eliminated this incident. Indeed though the jury was not generally sequestered, it was sequestered at this recess. State v. Andrews, 572 P.2d at 859.

[56] See discussion of the what petitioner alone characterizes as the "black power" gesture article, in Point I. A. supra at n. 31.

On direct appeal, the fairness of the trial issues were again framed by Andrews and his co-defendant only generally and they never cited facts to support a claim of juror bias based upon race. See Pierre's Brief on direct appeal, Points V and VI at 32-42 which Andrews joined (attached as Appendix E), and Andrews brief on direct appeal Points I and II at 3-7 (attached as Appendix F) and both appellants' petitions for rehearing in said cases (attached as Appendix G). Accordingly, the Utah Supreme Court addressed the issues only generally with no reference to race as an issue. See State v. Pierre, 572 P.2d at 1348-50; State v. Andrews, 574 P.2d at 710; and State v. Andrews, 576 P.2d at 858-59.

On state habeas corpus, Andrews' petition merely reiterated the same factors he had previously asserted both at trial and on appeal with no supplemental reference to new evidence that race played any role in his particular case. (He raised only the systemic discrimination claim.) He added one conclusory allegation that there were "strong racial feelings that surrounded the trial" but he provided no specifics beyond the napkin incident. See Andrews Am. Pet. 11/24/78, paragraph 11 at 3 (attached as Appendix B).[57] He proffered no additional evidence at the hearing on the respondents' motion to dismiss the petition, and he sought additional time for discovery (implying that he did not yet have data to support his conclusory allegation). See excerpts from transcript of 11/30/78 hearing at 9-10 (attached as Appendix H).

Petitioner's failure to raise the issue in state court procedurally defaulted the claim. The Utah Supreme Court has adopted a strict waiver rule for state post-conviction proceedings. It is well settled that a petitioner "cannot raise issues in post-conviction proceedings which could or should have been brought on direct appeal, except in unusual

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[57] Andrews was represented by his present counsel, Timothy K. Ford, at this and all subsequent stages of this case.

circumstances."[58] Robbins v. Cook, 737 P.2d 225 (Utah 1987) (citing Codianna v. Morris, 660 P.2d 1101 (Utah 1983)). "A collateral attack by way of habeas corpus may not be utilized as a substitute for, or a duplication of a direct appeal." Andrews v. Morris, 607 P.2d at 819. And the state supreme court has strictly applied the waiver rule to bar subsequent post-conviction petitions which raise issues which should have been brought in earlier petitions. Robbins v. Cook II, Ut. Sup. Ct. No. 870134 (May 29, 1987) ("The issues raised by [petitioner] either were or should have been brought on direct appeal or on his previous writ of habeas corpus and cannot be brought at this time)." (Emphasis added.) (A copy of the court's minute entry is attached as Appendix I). See also Utah's Post-conviction Remedy Rule, Utah R. Civ. Proc., Rule 65B(i)(2) ("if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionally of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint ... and no further proceedings shall be had on such complaint," and "(4) all claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceeding except for good cause shown therein.").[59] Thus, petitioner has procedurally defaulted any available remedy he may have had on this claim in the state courts.

Pursuant to federal law, "[w]hen a procedural default bars litigation of a constitutional claim in state court, a state

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58 "Unusual circumstances" include situations where it would be "unconscionable not to reexamine the conviction." Andrews v. Morris, 607 P.2d at 820, citing Brown v. Turner, 21 Utah 2d 96, 440 P.2d 968, 969 (1968).

59 Federal courts follow a similar rule, holding that raising issues in a successive habeas petition that were not raised in a previous petition constitutes an abuse of the writ which requires dismissal of the petition. E.g. Straight v. Wainwright, 106 S. Ct. 2004 (1986); Antone v. Dugger, 465 U.S. 200 (1984); Woodard v. Hutchins, 464 U.S. 377, 397-78, 380 (1984). In re Shriner, 735 F.2d 1236 (11th Cir. 1984); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc), cert. denied, 466 U.S. 976 (1984). See also 28 U.S.C. § 2244(b); Rule 9(b) of Rules Governing Section 2254 cases in the United States District Courts.

prisoner may not obtain federal habeas corpus relief absent a showing of 'cause and actual prejudice.'" Reed v. Ross, 468 U.S. 1, 11 (1984) citing Engle v. Isaac, 456 U.S. 107, 129 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977). Petitioner, on federal habeas corpus, never attempted to establish cause and prejudice for his earlier state procedural default.[60] Moreover, any such attempt would have failed under the facts of this case. This Court has declined to provide a comprehensive catalog of the circumstances that would justify a finding of cause. Smith v. Murray, 106 S. Ct. 2661, 2666 (1986). However, "[t]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Murray v. Carrier, 106 S. Ct. 2639, 2641 (1986). Petitioner also could hardly have relied on the novelty of the claim as cause. In Reed v. Ross, 468 U.S. 1 (1984), this Court stated that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." Id. at 16. But "the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 106 S. Ct. 2661, 2667 (1986). See also Loggins v. Lockhart, 822 F.2d 764 (8th Cir. 1987). Additionally, cause does not exist when "various forms of the claim . . . [have] been percolating in the lower courts . . ." Smith v. Murray, 106 S. Ct. at 2667. This issue of race discrimination in his own case was clearly foreseeable. Cf. Spinkellink v. Wainwright, 578 F.2d 582, 614-15.

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60 Petitioner failed to even assert in his initial federal petition the claim that race discrimination had occurred in his particular case. See Andrews Am. Pet., Nov. 1980, paragraph 13 at 7-9. Respondents moved to dismiss that petition in part, on the theory that unless petitioner pointed to specific acts of discrimination in his case, mere systemic challenges of discrimination should be rejected as a matter of law. Respondents' motion to dismiss memorandum. January 6, 1981 at 79-8[illegible] (Vol. II, 90).

It was not until he filed his second amended petition in 1984, that he began to frame the issue asserting the various conclusory allegations of race discrimination, specific to his own case, which he reasserts but embellishes in his petition for certiorari. See Point I. A., supra.

However, as this Court stated in Smith v. Murray, 106 S. Ct. at 2668, the determination that petitioner has failed to show cause for not raising the issue at an earlier time does not end the inquiry. "[']In appropriate cases the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamental unjust incarceration.'" Murray v. Carrier, 106 S. Ct. at 2650. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Id. at 2650.

In the instant case the application of the cause and prejudice test to this issue will not result in a "fundamental miscarriage of justice," Engle v. Isaac, 456 U.S. at 135, because overwhelming evidence was presented at trial of petitioner's guilt. Also, the fact that petitioner's co-defendant, Keith Roberts, also a black and also charged with the murders, was not convicted of murder belies petitioner's claim that Andrews was convicted and sentenced to death merely because he was black. Without deciding the question of cause, this Court may conclude, therefore, that petitioner suffered no actual prejudice from the individualized racial bias he claims existed at his trial.

2. PETITIONER'S SYSTEMIC DISCRIMINATION CLAIM WAS FOUND TO BE PROCEDURALLY DEFAULTED BY THE STATE COURTS.

At trial, Andrews raised no claim of systemic race discrimination in Utah because he and his co-defendants were the first to be tried under Utah's 1973 death penalty statutes. However, he did not raise the issue at any time during the long course of his direct appeal which did not finally conclude until January 17, 1978, well over three years after his conviction and sentencing. State v. Andrews, 576 P.2d 857, 858 (Utah), (supplemental opinion on rehearing), cert. denied, 439 U.S. 882 (1978).

Petitioner first raised the claim four years after his conviction in his first state habeas corpus action filed in November, 1978. The allegations in paragraph 12 of his amended petition, however, were wholly conclusory. He sought time for discovery and funds to secure expert testimony (implying that statistical data had not yet been assembled in support of his petition). See Andrews' Am. Pet. 11/24/78, paragraph 12B at 8-9, 11 (attached as Appendix B). At the hearing on responderts' motion to dismiss the petition, Andrews' co-petitioner, Selby, merely alluded to one factually dissimilar case where a death sentence had not been given and indicated there were at least six others "where capital exposure was had" but "was relieved for whatever reason." Neither he nor Andrews proffered sufficient evidence to indicate systemic discriminatory action. They proffered no statistical study, formal or otherwise, on capital sentencing in Utah or elsewhere to support their request for an evidentiary hearing on the claim. See excerpts from transcript of 11/30/78 hearing at 11-12, 16-18, 28-29 (attached as Appendix H). The court dismissed the issue on the grounds that it could or should have been raised on direct appeal, that no developments of fact or law had occurred since the filing of petitioner's direct appeal, and that the claim failed to state a claim on which relief could be granted or on which a hearing need be held. The court's findings and conclusions are set forth in full in Andrews v. Morris, 607 P.2d 817, 819-20.

The Utah Supreme Court, in Andrews v. Morris, 607 P.2d at 821, affirmed. A close reading of the overall structure and substance of that opinion establishes that the court found the claim to have been procedurally defaulted on two grounds, and only addressed the merits of the claim in the alternative as dictum.

First, the opening four pages of the opinion set forth the lower court's findings and a detailed analysis of Utah's

doctrine of procedural bar which the court found consistent with similar federal doctrines. 607 P.2d at 818-21. The court observed that:

> In his argument to the court below, Andrews delineated the issue presented as whether or not new, significant developments of fact or law have occurred since the taking of the direct appeal which have created issues that should now be litigated and which would not have been litigated in prior proceedings.

Id. at 818. The court continued:

> Andrews first contends that the trial court erred in failing to determine which of his constitutional claims were new, whether any of them had been waived, and which of them were based on new facts or law not available at the time of his direct appeal. In light of our discussion of this matter in the proceeding paragraphs, and in further light of our discussion of the findings and conclusions of the trial court hereinabove recited, we deem this contention to be without merit.
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> [I]n light of the long established doctrine of waiver, the trial court was clearly and simply called upon to determine whether the issues raised in the petition were or could have been raised on appeal. . . . and our review [of the pleadings and documents of record] causes us to conclude that the court did not err in dismissing the petition.

Id. at 822. It concluded that:

> Andrews clearly had the burden of showing why the issues could not have been raised on appeal. In this regard his petition was deficient and thus failed to state a claim.

Id. at 821.

Secondly, the court found that dismissal of the petition was proper because petitioner had procedurally failed to comply with Utah's postconviction remedy rule with respect to the claim because his allegations were conclusory:

> We note initially that the petition for relief is drawn in conclusional language and is lacking in factual data to support the allegations, contrary to the mandate of said Rule 65B(i), which reads, in pertinent part as follows:
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> (2) The complaint [petition] . . . shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any Constitutional rights were violated. The

> complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations.
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> In fact the petition seeks "adequate" time for briefing, discovery, and preparation for a hearing thereon . . . .
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> In the instant case, the hearing on the motion to dismiss was held on November 30, 1978, some twelve months after the November 25, 1977, affirmance of the conviction and sentence on direct appeal. We deem that to be adequate time to assemble all pertinent data for postconviction proceedings.

Id. at 821.[61]

Third, in the alternative, the court affirmed the dismissal of the petition on the ground that such systemic challenges could be dismissed as a matter of constitutional law (adopting the reasoning of Spinkellink v. Wainwright, 578 F.2d 582. Id. at 825. See also companion case of Pierre v. Morris, 607 P.2d at 814-15 (systemic racial bias claim one of law that could have been raised on direct appeal but was not was waived; no issues that render it wholly unconscionable not to reexamine regardless of waiver).

The Tenth Circuit reached the systemic race discrimination issue on the theory that because the state courts had reached the merits of the claim in the alternative, the door was opened for federal review (citing Morisbito v. Morris, 702 F.2d 207, 209 (10th Cir. 1983). The weight of authority in other

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[61] Petitioner filed a successive habeas corpus petition with the Utah Supreme Court which was denied in Andrews v. Morris, 677 P.2d 81 (Utah 1983). His petition contained a variation on the systemic race issue in the context of how the Wood-type standard had been applied in the trial courts in cases involving white defendants. He attached affidavits in support of this issue. Again, his proffer was found to be clearly deficient to support his claims. Andrews v. Morris, 677 P.2d at 97. In his petition for rehearing in that case at 5, (Vol. XIV), he attempted to excuse the inadequacy of his proffered evidence by blaming the court:

> Petitioner has . . . not again proffered the evidence this court refused to hear in Andrews v. Morris, 607 P.2d 816, 825 (Utah 1980), regarding the arbitrary and racially discriminatory manner in which the death penalty had been imposed throughout the State of Utah, and the particular evidence of discrimination against petitioner in this case. That evidence has been gathered for a hearing in federal court--and petitioner remains willing to present it in state court; but this court has refused to hear it.

(As previously shown, petitioner failed to even proffer it when he returned to federal court).

circuits, however, is that procedural bar to federal review on the merits still applies. See Phillips v. Smith, 717 F.2d 44, 47-51 (2d Cir.), cert. denied, 465 U.S. 1027 (1984) citing Michigan v. Long, 463 U.S. 1032 (1983); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 439-40 (3d Cir. 1982) (state court reliance on procedural bar as an alternative holding suffices to bar federal habeas review; those interests that justify adoption and enforcement of procedural rules are equally present whether or not a decision based on procedural default is followed by a discussion on the merits; a state court may reach the merits of a claim merely to give guidance on a difficult and unsettled issue of law or to show its decision grounded on procedure is not unfair); Thompson v. Lynaugh II, 821 F.2d 1080, 1081-82 (5th Cir. 1987); Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), cert. denied, 444 U.S. 868 (1979); Hockenbury v. Sowders, 620 F.2d 111 (5th Cir.), reh'g denied, 633 F.2d 443 cert. denied, 450 U.S. 933 (1981) (where procedural default was a "substantial basis" of the state court's denial of relief, federal court barred from reaching merits); United States ex rel. Veal v. DeRoberts, 693 F.2d 642, 650 (7th Cir. 1982); Dietz v. Solem, 640 F.2d 126, 131-32 n. 1 (8th Cir. 1981) (state courts may choose to reach merits in dictum, yet invoke procedural default which bars federal habeas review on merits); Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983) 468 U.S. 1220, cert. denied, 104 S. Ct. 3591 (1984).

In summary, because petitioner's claims of individual and systemic racial bias were found to be procedurally defaulted by the State courts, the Tenth Circuit should not have reached these issues. Reed v. Ross, 468 U.S. at 11 (procedural default of claim in state court bars federal habeas review absent showing of cause and prejudice). This is especially true in light of the conclusory manner in which petitioner has continually framed these issues. Petitioner failed to adequately demonstrate cause and prejudice sufficient to warrant review in federal court of these issues. This Court should, therefore, deny certiorari.

II.

THE TENTH CIRCUIT PROPERLY APPLIED THE CONTROLLING DECISIONS OF THIS COURT IN FINDING THAT ANDREWS' DEATH SENTENCE WAS PROPORTIONATE PUNISHMENT UNDER THE PRINCIPLES OF ENMUND V. FLORIDA, 458 U.S. 782 (1982) AND CABANA V. BULLOCK, 474 U.S. 376 (1986), AND PROPERLY DENIED REHEARING ON PETITIONER'S CLAIM THAT TISON V. ARIZONA, 107 S. CT. 1676 (1987) REQUIRED A REMAND OF HIS CASE TO THE STATE COURTS FOR A REDETERMINATION OF THE EXTENT OF HIS CULPABILITY.

The Tenth Circuit, after reviewing Utah's capital murder statutes, the jury instructions given in this case, the record evidence of Andrews' involvement in the crimes, and the theories asserted by Andrews' trial counsel in his arguments to the jury, Andrews v. Shulsen, 802 F.2d 1256, 1272-75 (10th Cir. 1986), determined that "[t]his case was tried and presented to the jury on a theory of intentional or knowing murder rather than felony murder." Id. at 1272.[62] It found that the jury was instructed that "a party must act with the same mental state as that required for commission of the murder, including intent, and

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[62] This Court has repeatedly recognized that Utah's first degree murder statute requires a showing of intentional or knowing murder, and not mere straight-felony merder. Enmund v. Florida, 458 U.S. 782, 789-90 n. 7 (1982); Tison v. Arizona, 107 S. Ct. 1686 n. 10 (1987). Indeed, the Tison Court recognized Utah's statute also does not allow a death sentence for felony murders involving lesser culpable mental states or for mere showing of defendant's substantial involvement in the felony. Id. In its Eighth Amendment analysis, the Court included Utah's system among those at the opposite end of the spectrum from states which allow the death penalty for felony-murder simpliciter ("solely for participation in a robbery in which another robber takes a life," with no requirement of a culpable mental state). Id. at 1682, 1684. Utah was grouped among the small minority of states which require the highest degree of mental culpability (intentional or knowing) before the death penalty can be exacted. Id. at 1685-86, 1688. Utah was not among the majority of jurisdictions, as was Arizona, which fall somewhere in the middle of the spectrum ('mid-range felony-murder cases") authorizing the death penalty for felony-murder where the defendant's mental state falls short of intent to kill and/or where the extent of a defendant's participation in the felony is merely taken into account. Id. at 1685-86. Indeed, Utah's system not only requires the highest culpable mental state, but also takes into account the degree of a defendant's participation by recognizing as a statutory mitigating factor whether "[t]he defendant was an accomplice in the murder committed by another person and his participation was relatively minor." Utah Code Ann. § 76-3-207(2)(f) (Supp. 1986) (formerly § 76-3-207(1)(f) (1973), in effect at the time of Andrews' trial). This latter feature alone, without an added mens rea requirement, would qualify Utah for inclusion in the Court's "mid-range felony-murder" listing and out of the felony-murder simpliciter categorization. 107 S. Ct. at 1686-87. But, Utah has both features, thus placing it perhaps at the top of the highest end of this Court's spectrum, demanding the greatest showing of culpability for death sentencing anywhere in the country.

that Andrews must have acted with knowledge that his acts were furthering a deliberate homicide." Id. at 1273. Also, the instructions "clearly required the jury to find that Andrews knew of the impending murders and that he had the same intention to kill as Pierre", and that "Andrews' physical withdrawal from the basement was done with the understanding that Pierre fully intended to kill the victims that he, Andrews, had just helped to capture, bind, poison, and rob." Id. at 1274.[63] Cf. Utah Code Ann. § 76-5-202 (1973) (Appendix A) and Instruction Nos. 8, 12-14 (Appendix J). Accordingly, the Tenth Circuit found that Andrews' death sentences comported with the requirement of Enmund v. Florida, 458 U.S. 782, 797, 799, 801 (1982) and Cabana v. Bullock, 106 S. Ct., 689, 693, 697 (1986), that the record establish a finding that the defendant either killed, attempted to kill, or intended that a killing take place or that lethal force would be employed.[64]

The Tenth Circuit's findings and conclusions are consistent with those of every court which has reviewed this case. See Andrews v. Shulsen, 600 F. Supp. 408, 430-31. Andrews v. Morris, 607 P.2d 816, 824, and 607 P.2d at 826 (Stewart, J. concurring); State v. Andrews, 574 P.2d 709, 710-11; and State v. Pierre, 572 P.2d 1338 (companion case). Moreover, Andrews has previously petitioned this Court for certiorari asserting that he was not found to have intentionally or knowingly caused the death

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[63] Andrews claims that the Tenth Circuit's analysis "ignored" other plausible readings of the instructions including the theory that he could have been convicted of murder simply on the basis of an intent to help the murderer escape in conjunction with a failure to effectively withdraw from the crime. Petition at 21 n. 10. The Tenth Circuit did not "ignore," but fully analyzed and rejected this possibility, 802 F.2d at 1273-74, concluding that "the clear requirement of instruction 12 that a party must act 'with the mental state required for the commission of an offense' and 'with an intent that his act will further, or cause the crime to come about' negates the possibility that the jury could have convicted Andrews without also making the requisite finding that he intended the murders." Id. at 1274.

[64] The Tenth Circuit recognized Cabana's holding, 106 S. Ct. at 695-97, that a death sentence may rest upon a guilty verdict which necessitates a finding of intent, or upon appropriate factual findings made by a state trial judge or appellate court. 802 F.2d at 1272. In Andrews' case, Utah's statute and jury instructions necessitated a finding of Enmund-type intent, and, as will be shown, infra, the Utah Supreme Court made appropriate factual findings of such intent.

or another, and certiorari was denied on this issue. Andrews v. Morris, 449 U.S. 891 (1980).

Despite these repeated findings that the higher degree of culpability required by Enmund, Cabana, and Utah statutes, was established and found in this case, Andrews now attempts to bring his case within the parameters of Tison v. Arizona, 107 S. Ct. 1676 (1987)--a case which held the death penalty also appropriate for the less culpable defendant who neither intends to kill nor inflict the fatal wounds, but whose participation in a felony is major (substantial) and who exhibits reckless indifference for human life. 107 S. Ct. at 1688.[65] In Tison the Arizona Supreme Court, on collateral review, had interpreted the Enmund intent requirement as including situations where a defendant "contemplated or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." 107 S. Ct. at 1680-81. This Court found this to be an attempt to reformulate "intent to kill" as a species of foreseeability, and that this definition of intent is broader than what had been described in Enmund. Tison, 107 S. Ct. at 1684. However, this Court noted that the Arizona Supreme Court had found the Tison brothers' participation in events leading up to and following the murders "substantial," id. at 1680-81, but had not specifically addressed whether their actions displayed reckless indifference to human life--the second prong of the new Tison standard. The case was remanded for such a determination of the second requisite pursuant to Cabana, 106 S.

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65 Like Enmund and Cabana, and unlike the instant case, the Tisons were tried and their juries instructed on straight felony-murder and accomplice liability theories which allowed for a conviction of capital murder where a killing occurs during the perpetration of certain enumerated felonies, and each participant in the felony is deemed legally responsible for the acts of his accomplices without regard to his own mental state as to the killing. However, in imposing the death sentences on the Tisons, the sentencing judge additionally found their participation in the crimes giving rise to the felony murder rule "very substantial" and that each could "reasonably have foreseen his conduct... would cause or create a grave risk of ...death." 107 S. Ct. at 1680-81. The Arizona Supreme Court agreed and upheld the death sentences despite observing that the brotners did not plot to kill the victims, intend that the victims die, or actually pull the triggers. Id.

Subsequently this Court issued its opinion in Enmund.

Ct. at 695-97 (which allows such findings to be made by state appellate courts based upon the record), and as a matter of comity. It was in this context that Tison was remanded for further proceedings.

Thus, Tison does to suggest any need for remanding a case for determination of a defendant's culpability where a defendant, like Andrews, was tried and his jury was instructed on a theory of intentional or knowing killing as required by the state's first degree murder statute, and where the state courts have already found that the evidence in the record establishes the presence ot this higher mental state.[66]

Petitioner, through a very selective reading of only portions ot the Utah Supreme Court's opinion in State v. Andrews, 574 P.2d 709 (Utah), cert. denied, 439 U.S. 882 (1978), attempts to make it appear that the court applied the same "erroneous standard employed by the Arizona Supreme Court in Tison." Petition at 18, and that Tison thus requires that this case be remanded to the state courts for a redetermination of his level or culpability for these murders under the Eighth Amendment. Petitioner chooses to ignore other portions of tnat and other Utah Supreme Court opinions in his case containing additional facts and findings of intentional or knowing killing. The State v. Andrews opinion opens with a reference to the companion case of State v. Pierre, 572 P.2d 1338 (Utah 1977), where the reader is rererred to "the numerous facts, references, authorities and reasons of which are pertinent and controlling here." State v. Andrews, 574 P.2d at 709. The court stresses that "[f]acts, explanations, and other matters supplemental to those recounted in Pierre are stated in this opinion." Id. (emphasis is the

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66 Petitioner misleads this Court when he implies that the Tenth Circuit did not have the benefit of this Court's decision in Tison when it decided this issue. Petition at 21. While Andrews' petition for rehearing was still pending, Tison was decided. The Tenth Circuit ordered the parties to file supplemental briefs addressing the possible effects of Tison. Petitioner's brief contained claims similar to those in his petition for certiorari. Rehearing was subsequently denied.

court's).[67] The court then addressed "whether the sentence of death imposed upon the defendant should be vacated because it is disproportionate and excessive in relation to the offenses for which he was convicted and his involvement therein." 574 P.2d at 710. In determining this issue, the court reiterated:

> [T]his Court recited in detail in Pierre the nature and circumstances of the three murders. We have briefly supplemented here these recitals by enumerating the particularized characteristics of the defendant and his involvement in these murders. And we conclude that so far as the verdict of death is concerned, the evidence discloses overwhelmingly that the jury could reasonably and unarbitrarily find as it did; and after our review of the matter, we hold that because of defendant's involvement in these murders and his background and characteristics, disproportionality between the crimes of murder and the death sentence does not exist.

574 P.2d at 710-11 (emphasis added.) The court further observed that:

> Defendant's complicity in these murders was deep; his actions bold and gross. He indeed significantly aided in triggering a milieu that ended in catastrophe and death--and did so knowing at the beginning of this episode of terror that it would most probably conclude as it did.

574 P.2d at 711 (emphasis added).[68]

To fully understand the court's finding of Andrews "involvement" and "complicity in these murders," the facts relating to him enumerated in State v. Pierre, 572 P.2d 1338 (1977), necessarily must be considered as well. Those facts include:

(1) the victims were tied up and made to lie on the floor. Id. at 1343.

(2) they were "forced to drink liquid Drano...by the defendant in company with Andrews, who aided the defendant by pouring the caustic into a plastic cup for accomplishment of these violent acts." Id.

67 Thus, the facts petitioner quotes from State v. Andrews, 574 P.2d at 709, in his petition for certiorari at 19 are only the few facts the supreme court intended should supplement the far more detailed facts relating to Andrews found in the court's separate opinion in State v. Pierre.

68 This is the only portion of the Court's findings petitioner chooses to cite to this Court.

3. "the defendant and Andrews both had guns and defendant finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun which caused the deaths. Id.

4. "evidence further establishes that Orren and Stanley Walker were robbed in an aggravated manner of personal property in their possession...by the defendant, Andrews and Roberts." Andrews was inside the shop during the robbery. Id.

5. Andrews purchased the van used in the robbery. Id. at 1344.

6. Andrews had stated in February, 1974, that he would like to rob a hi fi shop and would kill anyone who got in his way. Id.

7. Andrews priced stereo items at the Hi-Fi Shop two days before the fatal day. Id.

8. Personal belongings of the victims were found next to the defendant's barracks as well as Hi-Fi Shop labels in Andrews' room and in a garbage can in the latrine of defendants' barracks. Id.

9. Michelle, Cortney and Stanley pled for their lives before the defendant and Andrews. Id.

More importantly, in State v. Pierre, which the State v. Andrews opinion merely supplements, the court observed that Utah's first degree murder statute "requires the actor to cause intentionally and knowingly the death of another under aggravating circumstances," and that "[f]irst degree murder in brief requires a conjoining of 'intentional and knowing' with enumerated facts." Id. at 1354. Thus, the Supreme Court had to find these elements to affirm both Pierre's and Andrews' convictions of first degree murder, as well as to sustain their

sentences in these companion opinions.[69]

Under Tison and Cabana, state court findings on a defendant's degree of culpability need not be limited solely to those made by the state court on direct appeal. Andrews' case was also twice reviewed by the Utah Supreme Court on collateral review. In Andrews v. Morris, 607 P.2d 816, Andrews had asserted under Lockett v. Ohio, 438 U.S. 586 (1978), that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant took a life or possessed a purpose (intended) to cause the death of the victim. The Utah Supreme Court responded that "[t]he facts in Lockett are to be contrasted with those of the instant case wherein Andrews was an active participant in acts of torture which preceded the final acts of murder." Id. at 824. The court alluded to the facts as to Andrews' participation in the events leading up to the murders which it had enumerated in State v. Pierre and concluded that:

> the instant case does not impose a 'purely vicarious theory of liability' as characterized by Justice Marshall in Lockett.
>
> We deem Lockett to be inapplicable...because Andrews' acts of participation were significantly different than Lockett's.

Id. Justice Stewart separately concurred that Utah law does not allow for a constructive intent or an imputed mens rea, and that juries must be instructed that persons not directly responsible for the actual killing must have had the purpose and intention that another be killed and the evidence must support that proposition. He then found that in Andrews' case:

> the trial judge instructed the jury with great care that the death penalty could be imposed only if the jury found that each defendant personally intended that one or more of the victims be killed. In my view the evidence in this case amply supports the implied jury finding that the appellant did in fact harbor such an intention.

[69] Indeed, were this court to remand this case now for an assessment of whether the lower degree of culpability announced in Tison is present for Eighth Amendment purposes, the defendant could only be convicted of second degree murder under Utah law. Utah Code Ann. § 76-5-203 (1978) lists reckless disregard for human life as murder in the second degree. Yet Andrews' trial counsel never sought an instruction on lesser included offenses at trial, and did not claim on appeal that such instructions should have been given.

Id. at 826.

Later, in Andrews v. Morris, III, 677 P.2d 81 (Utah 1983), in the appendix to the supreme court's unanimous opinion, the court factually found that Andrews and Pierre:

> held five people at gunpoint, all of whom were viciously tortured and seriously injured, one of whom was raped, and two [sic] of whom died as the result of their injuries. The victims were bound and imprisoned in the store's basement and were forced by both petitioners to drink a caustic chemical substance capable of causing their deaths. The State Medical Examiner testified that the substance would have caused the deaths of the murder victims but for the gunshot wounds they later sustained, and the death of the survivors but for the promptness of the medical attention given to them. Both petitioners covered the victims' mouths with tape after the administration of the caustic liquid.

Id. at 98. It further noted that Andrews also made no effort to halt the course of events which later transpired. Id.

Given these various state court findings, it is inconceivable that the Utah Supreme Court applied the erroneous standard the Arizona Supreme Court used in Tison or failed to find that Andrews' acted intentionally or knowingly as required by Utah law, or failed to find that he attempted to kill, intended that a killing take place, or that lethal force would be employed as required by Enmund and Cabana.

Finally, Petitioner claims the objective facts bearing on his level of culpability "are far more equivocal than in Tison." Petition at 19. Andrews' participation did possess some similarities to that of the Tisons'. He participated in the planning of the underlying felony, personally expressed a willingness to kill (in a discussion with an acquaintance before the robberies), brought weapons to the scene, abducted and bound the victims, escorted them to the murder site, heard them beg for mercy, participated in discussions as to what to do with them, made no effort to help them, and continued to participate in felonious acts with his co-defendant after the killings. The deaths would not have occurred but for Andrews' assistance, and there was evidence Andrews could have anticipated the use of lethal force. He also did nothing to interfere with or disassociate from the killer.

But far more than the Tisons, the victims' pleas for mercy were made directly to Andrews, and he personally participated in the repeated poisonings of his victims, watching as they wretched and vomited the drain cleaner he had repeatedly helped to administer. He aided in giving a second dose to Stanley Walker when the first dose failed to work. He personally put a gun to Orren Walker's head and threatened him in an attempt to force him to administer the caustic substance. He gave orders to Pierre to lock the door upstairs as the poisonings commenced. He taped the victims' mouths shut after the Drano had been administered to prevent them from spitting it out. Such an act could only have been motivated by an intent to kill or in contemplation that a life would be taken. Enmund, 458 U.S. at 801. The medical examiner verified that the dosages of the sodium hydroxide drain cleaner would have caused death had the victims been left unattended for 12-24 hours, and even then, survival would have depended on how skilled the medical attention was because the chemical burns to the victims' larynxes, esophaguses and stomachs were so severe.

Later, just before the shootings commenced, Selby told Andrews "about thirty minutes" and Andrews left. The fact that the total duration of the rape and the execution-style shootings indeed took "about thirty minutes," creates a reasonable inference that Andrews knew precisely what Selby was going to do when Andrews left the shop. And during the course of the shootings, Selby's .25 caliber automatic apparently ran out of ammunition.[70] Selby then momentarily left the basement, and returned, armed with the .38 caliber gun. Andrews had earlier been seen holding and spinning the chamber of a .38 caliber revolver. When Andrews exited the final time, the rear door was not rebolted as it had been before (3213). It is reasonable to infer from these facts that Andrews waited nearby (perhaps as a

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70 Two shots from the .25 caliber had been discharged earlier in the evening as Orren descended the stairs, one shot was fired into Carol's head, one shot into Cortney's head, one shot into the floor near Orren's head, one non-fatal shot at Stanley's head, and one non-fatal shot at Orren's head.

lookout) for "about 30 minutes" and during that time Selby obtained the .38 from him to complete the shootings. The final two fatal shots into the heads of Michelle and Stanley were from the .38 caliber weapon.[71] Clearly, Andrews' death sentence is sustainable, not only under the new Tison standard, but under the higher standard of Edmund and Cabana. There is no need to remand this case for a further assessment of Andrews' culpability.[72]

III.

BECAUSE PETITIONER HAS NEVER PREVIOUSLY RAISED THE "DOUBLE COUNTING" ISSUE, HE IS PROCEDURALLY BARRED FROM RAISING IT FOR THE FIRST TIME ON CERTIORARI. ADDITIONALLY, THE CAPITAL SENTENCING PROCEDURES IN UTAH ARE CONSTITUTIONAL AND THE GRANT OF CERTIORARI IN LOWENFIELD V. PHELPS, 86-6867, 55 U.S.L.W. 3852 (JUNE 22, 1987) DOES NOT REQUIRE THAT THIS COURT GRANT CERTIORARI IN THE PRESENT CASE

This Court recently granted certiorari to determine whether a sentencing scheme that permits a death sentence to be based on a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious imposition of

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71 At least four other .38 caliber slugs from the same weapon were located at the scene. See n. 6, supra.) It is not known when they were fired, who fired them, or who or what the intended targets of these other shootings were.

72 Petitioner claims that unlike the Tisons, he "on several occasions protested his co-perpetrator's violent behavior." Petition at 19. Yet, Orren characterized Andrews and Selby's various communications during the evening, not as arguing, but "more for carrying things out, just what was transpiring" (3203). Orren also said that Andrews' comment "What did you do that for man?" after Selby's gun unexpectedly discharged twice into the darkness is readily attributable to the fact Andrews was standing in front of Selby and jumped and was startled by the sudden shots (3140, 3203). He also may have been concerned that the shots would attract the attention of others including law enforcement officers, and was not in accordance with their plan to use a more silent killer--the liquid drain cleaner (which they apparently had brought with them, and which they already had out on a stool when Orren arrived).

The fact that Andrews appeared "nervous and upset is of little consequence given that Orren testified that Selby was flighty too (3203), and that Andrews' being disturbed was readily attributable to Selby's gun suddenly going off (3203).

Andrews comment, "I can't do it, I'm scared" can hardly be characterized as a protestation of Selby's subsequent behavior. Taken in conjunction with the "about thirty minutes" comment and other evidence cited above, the reasonable inference is that Andrews intended that the killings occur, but simply did not want to be the one to pull the trigger.

the death penalty. Lowenfield v. Phelps, No. 86-6867, 55 U.S.L.W. 3852, 3876 (June 22, 1987). Although certiorari was granted in Lowenfield, certiorari review of the present case is not warranted for two reasons.

A. PETITIONER IS PROCEDURALLY BARRED FROM RAISING THE CLAIM FOR THE FIRST TIME ON CERTIORARI.

The issue is barred from consideration by this Court under doctrines of procedural default. Petitioner failed to ever raise this issue in the state courts. It was neither raised at trial nor on direct appeal. Petitioner will likely argue that his claim was preserved on direct appeal under his broader argument that Utah's sentencing statutes permit arbitrary and discretionary imposition of the death penalty in violation of the Eighth and Fourteenth Amendment principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972).[73] However, he never asserted the double-counting theory in support of his Furman argument. The Utah courts were never sufficiently alerted to the theory so as to consider it "fairly presented." Picard v. Connor, 404 U.S. 270, 275 (1971). One should not be allowed to merely shout "Furman" and expect every conceivable theory under Furman to be preserved for later review. Broad conclusory statements of general unconstitutionality under Furman with no supporting analysis or focus on specific defects in a state's system are inadequate to preserve an issue for later review. Id.

Petitioner also failed to raise this issue on state habeas corpus. Again, petitioner will likely argue that this issue was raised under his broader argument that Utah's sentencing statute is unconstitutional.[74] However, it is clear that neither the lower court considering the state habeas petition nor the Utah Supreme Court on appeal ever considered the "double-counting" issue. See Andrews v. Morris, 607 P.2d 816. The issue also was never raised in his subsequent state habeas corpus action. Andrews v. Morris II, 677 P.2d 81.

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73 See pp. 7-18 of Andrew's co-defendant, Pierre's brief on direct appeal, Appendix E, which Andrews joined.

74 See Paragraphs 12(A)(1)-(4) at pp. 3-7 of Andrews' Amended Petition, 11/28/78, attached as Appendix B.

As noted in Point I.B., supra, Utah applies a strict doctrine of waiver. Claims must be preserved on direct appeal and habeas petitioners are precluded from raising issues in postconviction proceedings which could or should have been brought on direct appeal unless it would be wholly unconsciousable not to reexamine the conviction (Utah's equivalent of the federal cause and prejudice, fundamental injustice exceptions). Robbins v. Cook, 737 P.2d 225 (Utah 1987); Andrews v. Morris, 607 P.2d at 819-20. The waiver rule also bars subsequent postconviction petitions which raise issues which should have been brought in earlier petitions. (Utah's equivalent to the federal abuse of the writ rule, Utah R. Civ. Proc. Rule 65B(i)(2)(4); Robbins v. Cook II, Utah Sup. Ct. No. 870134 (May 29, 1987) (attached as Appendix I).

Thus, under Reed v. Ross, 468 U.S. 1, 11 (1984), Engle v. Isaac, 456 U.S. 107, 129 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977), petitioner procedurally defaulted the claim for federal habeas corpus review. He never attempted to establish cause and prejudice for the default in the lower federal courts. Nor could he have done so.

As noted in Point I.B., supra, mere failure of counsel to recognize the factual or legal basis for a claim or to raise an issue despite recognizing it does not constitute cause, absent establishing that the claim was so novel that its legal basis was not reasonably available to counsel. This claim was clearly available to counsel when he was litigating in the state courts. It had been "percolating" in the various courts and was clearly foreseeable. Smith v. Murray, 106 S. Ct. 2661, 2667 (1986). E.g., Gray v. Lucas, 677 F.2d 1086, 1104-05 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983); Dobard v. State, 435 So.2d 1338, 1344 (Ala. Cr. App. 1982), cert. denied, 464 U.S. 1063 (1984); People v. Kubat, 447 N.E.2d 247, 276 (Ill. 1983), cert. denied, 464 U.S. 865 (1983); State v. Monroe, 397 So.2d 1258, 1274 n. 6 (La. 1981), cert. denied, 463 U.S. 1229 (1983); Leatherwood v. State, 435 So.2d 645, 648 (Miss. 1983), cert. denied, 465 U.S. 1084 (1984); State v. Taylor, 304 N.C. 249, 285-

6, 283 S.E.2d 761, 783-84 (1981), cert. denied, 463 U.S. 1213 (1983); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 567-68 (1979), cert. denied, 446 U.S. 941 (1980); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 622 (1979); State v. Pritchett, 621 S.W.2d 127, 140-141 (Tenn. 1981).

Nor could petitioner have established a fundamental miscarriage of injustice (where a constitutional violation has probably resulted in the conviction of one who is actually innocent. Engle v. Isaac, 456 U.S. at 135. Murray v. Carrier, 106 S. Ct. at 2650. Overwhelming evidence was presented at trial of petitioner's guilt. The overlap of the statutory aggravating circumstances with the capital offense definition did not preclude the development of any true facts or result in the admission of any false facts regarding any sentence question. The facts concerning all of the aggravating circumstances were fully admissible at both the guilt and sentence stages of petitioner's trial, irrespective of whether any of the statutory aggravating circumstances overlap with the capital offense definition. Moreover, as will be shown below, at the penalty phase, the State established additional aggravating circumstances beyond those petitioner claims were "double-counted." Also, it will be shown that Utah's statutory scheme does not contain the "double-counting" problem, petitioner claims. Thus, under the present circumstances, petitioner could not have shown cause for the default or prejudice resulting from it.

Finally, petitioner, on federal habeas corpus, not only failed to even attempt to establish cause and prejudice for his earlier state procedural default, but he failed to raise the "double counting" issue altogether in any federal proceeding.[75] The issue now surfaces for the first time on certiorari. This Court has repeatedly ruled that it will refuse to decide

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75 See Paragraphs 14(A)-(K) at pp. 12-17 of Andrews' Second Am. Petition, Appendix C. Again, petitioner will likely argue that his claim was preserved in the federal courts under his broader argument that Utah's sentencing statutes permit arbitrary and discretionary imposition of the death penalty in violation of the Eighth and Fourteenth Amendment principles enunciated in Furman v. Georgia, 408 U.S. 238 (1972).

questions not raised or resolved in the lower courts. See Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition for certiorari but not in court of appeals is not properly before us). In Illinois v. Gates, 459 U.S. 1028, 1029 (1982) (Stevens, Brennan and Marshall, Justices dissenting to restoration of case to calendar for reargument) citing Cardinale v. Louisiana, 394 U.S. 437 (1969), it was stated:

> [a]s a matter of appellate practice, it is generally undesirable to permit a party to seek reversal of a lower court's judgment on a ground that the lower court had no opportunity to consider. It is especially po . practice to do so when the basis for reversal involves a factual issue on which neither party adduced any evidence. Those considerations apply with added force when the judgment of the highest court of a sovereign State is being reviewed.

B. THE GRANT OF CERTIORARI IN LOWENFIELD DOES NOT REQUIRE THE GRANT OF CERTIORARI IN THE PRESENT CASE BECAUSE OF DISTINGUISHING FEATURES IN UTAH'S CAPITAL SENTENCING SYSTEM.

Should this Court find that the issue was adequately preserved below, certiorari still should not be granted because Utah's capital sentencing procedure is distinguishable from the sentencing procedures in the cases cited by petitioner.

Petitioner alleges Utah's procedures are unconstitutional in that the law allows for unguided discretionary imposition of the death penalty because the aggravating circumstance used to prove first degree murder at guilt phase is reconsidered at penalty phase. He argues that a jury could vote for the penalty of death without any standard of aggravation but the one found at the guilt phase of the trial and thus inadequate narrowing is done to determine appropriate candidates for the death penalty.

Petitioner cites Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied, 474 U.S. 1013 (1985), where the court held that it was error to submit to the jury at penalty phase the aggravating circumstance that "the capital felony was committed for pecuniary gain," when the defendant had been convicted at guilt phase of "the unlawful killing of a human being [while] engaged in the perpetration of . . . robbery." Id. at 263. This practice has been referred to as "double counting" or "doubling

up" of an aggravating circumstance. See Collins, 754 F.2d at 264 n. 3; Leatherwood v. State, 435 So.2d 645, 648 (Miss. 1983), cert. denied, 465 U.S. 1084 (1984). However, under the Arkansas statutes at issue in Collins, "a finding of killing in the course of a listed felony was not itself sufficient to warrant the imposition of the death sentence[;] [t]he jury also had to find at least one aggravating circumstance, and this circumstance had to be one of six listed in the statute § 41-4711," which contained as one alternative the "pecuniary gain" circumstance. Id. In other words, Collins was found guilty under the felony murder provision of Arkansas's first degree murder statute, which did not require proof of an intentional killing. As with most traditional felony murder statutes, a defendant is guilty of murder whether the killing was intentional or unintentional, so long as the killing was committed during the commission of an enumerated felony.[76] Under the Arkansas scheme, the state had to then prove the aggravating circumstance of pecuniary gain in order to render Collins eligible for the death penalty. But, by using that particular circumstance to aggravate the felony murder, the Collins court believed that the state had effectively circumvented the statutory requirement of proving an aggravating circumstance, since pecuniary gain is always an aspect of robbery (the underlying felony for the felony murder conviction). 754 F.2d at 264. Thus, the statutory aggravating circumstance did not perform its constitutionally necessary function of narrowing the class of persons eligible for the death penalty and there was the danger that a person could be sentenced to death for straight

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[76] See Tison v. Arizona, 107 S. Ct. 1676 (1987) for a detailed analysis of felony murder statutes in this country.

A felony murder provision is contained in Utah's second degree murder statute, Utah Code Ann. § 76-5-203(1)(d) (Supp. 1973). However, Utah's first degree murder statute only uses designated felonies as underlying "aggravating" circumstances for an intentional or knowing killing. See Utah Code Ann. § 76-5-202(1)(d) (Supp. 1973), and Point II, supra.

felony murder without regard to his intent. Id., citing Godfrey v. Georgia, 446 U.S. 420 (1980); Zant v. Stephens, 462 U.S. 862 (1983).

First, the Arkansas scheme applied in Collins is much different from the Utah statutes applied in petitioner's case. As discussed in Point II, supra, Utah's first degree murder statute requires a showing of an intentional or knowing killing under certain statutorily defined aggravating circumstances. Utah Code Ann. § 76-5-202 (Supp. 1973). A first degree murder verdict at the guilt phase is appropriate under the statute only when the prosecution demonstrates beyond a reasonable doubt intentional or knowing action together with one or more of the enumerated aggravating circumstances. A death penalty is neither automatic nor mandatory even when such elements are shown. A jury is not required to return a death verdict merely because they made the requisite findings under Section 76-5-202. Under Utah's capital sentencing statutes, Sections 76-3-206, -207 (Supp. 1973), a separate penalty hearing is held for consideration of more aggravating circumstances and the defendant's introduction of any fact in mitigation of the penalty. And even then the sentencer is not required to impose a death sentence if no mitigation evidence is presented.

The jury in Andrews' case heard evidence at the sentencing phase and determined whether total aggravation outweighed total mitigation and whether the death penalty was

appropriate in this particular case.[77] During the penalty hearing petitioner put on evidence of mitigating factors and the State put on evidence of additional aggravating circumstances..

Unlike the situation noted in Collins, the Utah scheme narrows the class of persons eligible for the death penalty by requiring intentional and knowing killing coupled with at least one statutory agggravating circumstance, both of which must be proved beyond a reasonable doubt as elements of first degree murder at the guilt phase of the trial. Then, "[a]s with the Texas scheme upheld in Jurek v. Texas, 428 U.S. 262 (1976)] the Utah system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature of the crime and the defendant's character, background, history, mental condition, and physical condition," Andrews v. Shulsen, 600 F. Supp. 408, 423 (D. Utah 1948) aff'd 802 F.2d 1256 (10th Cir. 1986); citing § 76-3-207; California v. Ramos, 463 U.S. 992, 1004 (1983), before the death eligible defendant is sentenced.

Therefore in Utah, although one convicted of first degree murder does enter the penalty phase with at least one built-in aggravating circumstance, this obviously was the intent of the legislature. An initial narrowing occurs at guilt phase[78] and then further narrowing based upon additional individualized

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77 The sentencing instructions required the state to prove that the total aggravating factors outweighed the mitigating ones. State v. Pierre, 572 P.2d at 137-48. The instructions identified numerous aggravating and mitigating circumstances, beyond those proved as elements at the guilt phase, which related not only to the circumstances of the crime, but the character of the defendant. Sent. Inst. No. 4, R. 414 (attached as Appendix K). And, of course, the instructions allowed the jury to consider all evidence received at both guilt and penalty phases and to factor in any aggravating circumstances they had previously found at the guilt phase into its overall weighing of all aggravating and mitigating factors. Sent. Inst. Nos. 1 and 4 (R. 412. 414) (Appendix K).

78 An intentional or knowing killing without an aggravating circumstance defined under § 76-5-202 is second degree murder. Section 76-5-203(1)(a).

information occurs at penalty phase--a procedure that does not run afoul of Godfrey. Thus, there is not the "doubling up" condemned in Collins, where the robbery circumstance effectively served to render the defendant guilty of first degree murder under the traditional felony murder rule, and also served to make him eligible for the death penalty--something the Eighth Circuit believed was never intended under Arkansas law and which created the "failure to narrow" violation identified in Godfrey and Zant. Collins, 754 F.2d at 265.

In any event, other courts have rejected "double counting" challenges similar to that made in Collins. For example, holding that the application of Mississippi's capital punishment statutes did not result in arbitrary imposition of the death penalty in violation of Furman, the Mississippi Supreme Court stated:

> Under our capital murder statute, when an accused is found guilty of capital murder arising out of a robbery, he then becomes subject to a jury finding that he should be executed if the jury feels that the facts justify it. However, his execution is not mandated and the jury may properly find that he should be sentenced to life in prison. They may so find whether the defendant puts on any evidence of mitigating circumstances or not. This is a far cry from the old statute which mandated execution upon conviction of a capital offense.
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> The appellant's argument that he enters into the sentencing phase of the bifurcated trial with one strike against him is correct in one sense--i.e., if he had not been convicted of a capital offense, there would be no need for the sentencing hearing and he would simply be sentenced to serve a life term. This does not mean though that the procedure is unfair or faulty.
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> At the sentencing hearing appellant may put on evidence of mitigating circumstances of an unlimited nature pursuant to section 99-19-101(6) (Supp. 1982) and Washington v. State, 361 So.2d 61 (Miss. 1978), so as to convince the jury that he should not be executed.

Leatherwood, 435 So.2d at 650. In Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, 464 U.S. 1063 (1984), the

Eleventh Circuit rejected the petitioner's argument that Florida's system made the "death penalty the 'automatically preferred sentence' in any felony murder case":

> The short answer is that the United States Supreme Court has upheld the Florida death penalty statute, including necessarily the use of this statutory aggravating factor. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Florida does not mandate the death penalty in all felony murder cases. The defendant is not precluded under Florida law from presenting any mitigating factors.

709 F.2d at 1447.

Finally, although certiorari was most likely granted in Lowenfield to resolve the conflict between the Eighth Circuits ruling in Collins, and the Fifth Circuits rulings in Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987); Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 106 S. Ct. 1984 (1987); Welcome v. Blackburn, 793, F.2d 672 (5th Cir. 1986), cert. denied, 107 S. Ct. 1985 (1987) and Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983), it appears that Lowenfield, like Collins is distinguishable from the instant case. In Lowenfield, apparently the only aggravating circumstance was the one included in the crime definition. Lowenfield, 817 F.2d at 288. In this case, in addition to the aggravating circumstances relied upon in the guilt phase, the State put on evidence of additional aggravation pertinent to petitioner's character, background, and history. Evidence was introduced that petitioner was on probation for felony theft when the murders occurred (4195) and that he had a prior criminal history of auto theft and burglary (4247-70). Additionally, the State introduced his military records reflecting several disciplinary actions and evidence that his military grade was reduced for misconduct (4242-46). Thus, unlike Lowenfield and Collins, the jury in this case had before it additional aggravating factors other than those used in the guilt phase of the trial. Cf. Thompson v. Lynaugh, 821 F.2d 1054, 1059-60 (5th Cir. 1987).

Given the significant differences between Collins and Lowenfield and petitioner's case, this Court should not grant certiorari on this issue.

IV.

PETITIONER'S ATTEMPT TO SEEK REVIEW OF A CAPITAL SENTENCING STANDARD WHICH THE UTAH SUPREME COURT ESTABLISHED IN ANOTHER UNRELATED CASE SHOULD BE REJECTED BECAUSE PETITIONER DID NOT ADEQUATELY PRESERVE THE ISSUE IN HIS OWN CASE; HE DEFAULTED IT FOR FEDERAL HABEAS CORPUS REVIEW; HE DID NOT FRAME IT IN THE SAME CONTEXT IN THE LOWER COURTS; THE STANDARD IS BASED UPON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS; THE STANDARD IS NOT REQUIRED UNDER CONTROLLING DECISIONS OF THIS COURT; AND THERE IS NO CONFLICT IN THE CIRCUITS WHICH UNIFORMLY CONCUR WITH OTHER FEDERAL AND STATE JURISDICTIONS THAT SUCH A SENTENCING STANDARD IS NOT CONSTITUTIONALLY REQUIRED.

Petitioner seeks to have this Court review whether an extremely high standard for capital sentencing adopted by the Utah Supreme Court, as a matter of state law, in a capital case totally unrelated to this case should now be embraced as a matter of federal constitutional law for this country. He asks this Court to declare that in addition to current requirements this Court has established for imposition of the death penalty, the Eighth and Fourteenth Amendments further require that a capital sentencer be persuaded beyond a reasonable doubt that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances, and that the death penalty is justified and appropriate in the circumstances. Certiorari should be denied for several reasons:

First, petitioner procedurally defaulted the issue for federal habeas corpus review because, despite his claims to the contrary, he failed to seek such a standard in his own case in the state courts (either on state law grounds or as a matter of federal constitutional law). The standard was sought by a Mr. Wood, in an unrelated case and never by Mr. Andrews. See State

v. Wood, 648 P.2d 71 (Utah), cert. denied, 449 U.S. 891 (1982).[79] Andrews seeks to use Wood's case to gain review of a sentencing standard Andrews personally never sought.

In Wood, the Utah Supreme Court stressed that Andrews and others had not raised the issue in the same context as had Mr. Wood. 648 P.2d at 80. Later, in Andrews v. Morris, 677 P.2d 81 (Utah 1983), the Utah Supreme Court exhaustively analyzed the history of Andrews' case in the state courts to determine whether he had ever sought the same capital sentencing standard Mr. Wood had sought. It determined that he had not, and the record amply

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79 In Wood, the Utah Supreme Court, recognizing that the sentencing standard it was proposing was not constitutionally required, held on "preferred grounds of statutory construction," that thereafter the appropriate standard for capital sentencing would be:

> After considering the totality of the aggravating and mitigating circumstances, [the sentencer] must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and . . . must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.

Id. at 82-83.

supports this finding. Id. at 86-88.[80] Despite this fact, the court reached the narrower question whether Andrews, whose case had long been final,[81] was nevertheless entitled to the retroactive benefit of the new sentencing standard, and concluded

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80 The court noted inter alia that Andrews did not submit jury instructions at the penalty phase of his trial and did not object to those given. (Cf. the trial transcripts at 4271, 4304-05). Citing from the briefs on direct appeal, the court found that Andrews sought a standard of requiring the State "to prove beyond a reasonable doubt the absence of any mitigating factor which the defendant raises in the sentencing proceedings." (See Point XII of Selby's amended brief on appeal which Andrews joined and which is attached as Appendix L). Thus, the court observed, Andrews confused the issue of the burden of proof of the existence of facts in aggravation or mitigation of his crime with the issue of the degree of certitude that the jury must reach about the imposition of the death penalty after consideration of mitigating and aggravating circumstances. Accordingly, the court's opinion on direct appeal only addressed and rejected the narrower standard Andrews had proposed. (Andrews has claimed he and his co-defendant framed the issue more broadly in Point XII, but when the point is read in its entirety and in context, it stands for no more than the narrower issue. Moreover, they failed to raise any form of the issue in their petitions for rehearing in that case). On direct appeal, the supreme court then addressed, on its own, whether the sentencing standard utilized in Andrews' case for reviewing aggravating and mitigating circumstances was sufficiently high to pass constitutional muster (solely under the due process clause of the fourteenth amendment, and not under the Eighth Amendment) and concluded that it was. But in doing so, it did not discuss a reasonable doubt standard, and Andrews had never contended for one. In Andrews v. Morris, the court ultimately concluded that the capital sentencing standard Andrews had previously sought was "imprecise and confused" and "certainly cannot be said to have been squarely posed as later occurred in Wood." 677 P.2d at 88.

The court did not examine whether Andrews sought the Wood-type sentencing standard in his first state habeas corpus petition (which was filed and denied before the Wood decision was rendered). However, his state petition shows that he did not. Paragraph 12(a)(4) of that petition (attached as Appendix B) claimed that there were "no standards or guidance by which sentencing authorities are to balance . . . aggravating and mitigating factors . . . or by which they are to determine whether a particular aggravating or mitigating factor has been established," and "[t]he State was required to meet no burden of proof as to any fact in the sentencing hearing, other than a general burden of persuading the jury that the death penalty 'was appropriate'." There is no reference to a reasonable doubt standard and Andrews never asserted the need for such a standard under the federal constitution.

81 "Final" meaning "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari [to the United States Supreme Court] had elapsed" before the new rule was announced. Linkletter v. Walker, 381 U.S. 618, 622, n. 5 (1965).

that he was not. Id. at 88-95.[82] But merely because Andrews sought the retroactive benefit of a ruling which had been based on state law does not change the fact that he never contended in the state courts, as he does in his present petition for certiorari, that the reasonable doubt standard for weighing aggravating and mitigating circumstances in a capital case is

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[82] The court recognized and applied well-established principles of federal retroactivity law in reaching its decision, and restricted retroactive application of the new standard only to cases not yet final. Id. at 88-95. (The court subsequently applied Wood retroactively to a case pending on direct appeal when Wood was decided, and thus not final. State v. Norton, 675 P.2d 577, 583-84 (Utah 1983).) The court in Andrews v. Morris also denied relief to Andrews on harmless error grounds observing that the evidence at his trial would have satisfied the Wood standard, and that the

> aggravating circumstances of petitioners' crimes so overwhelmingly outweighed the mitigating circumstances that "no rational judge or jury could . . . have determined [otherwise]." This Court, upon its own independent, comprehensive review of the record was clearly convinced there was no basis for reasonable doubt as to the legality and appropriateness of the imposition of the death penalty in these cases.
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> The entire record of petitioners' original trial is before us in connection with these petitions. We are familiar with all of the facts concerning their crimes and all of the evidence submitted at their sentencing hearing. We are able, on the basis of our examination of that evidence, to conclude with complete confidence that the use of the Wood standard in the penalty phase "could not possibly affect the balance." There can be no reasonable doubt that, in petitioners' circumstances, the totality of the aggravating factors outweighed the totality of the mitigating factors and the imposition of the death penalty was appropriate.

677 P.2d at 95-96. Contrary to petitioner's assertions, the Utah Supreme Court did not misstate the facts as to Andrews' involvement in reaching this decision. Cf. Statement of the Case, and Point II, supra.

constitutionally required.[83] The sole issue Andrews preserved for possible federal review was whether the Utah Supreme Court's refusal to give him the retroactive benefit of the state law based Wood standard somehow violated federal constitutional rights (ie. his rights to equal protection and due process).[84]

In his second amended federal habeas corpus petition (attached as Appendix C), Andrews merely reiterated his claim that no standards are provided in Utah whereby sentencing authorities are to balance aggravating and mitigating factors, or by which they are to determine whether a particular aggravating or mitigating factor has been established.[85] He added that the Utah Supreme Court changed the burden but the rule was not applied by the trial court or the Utah Supreme Court in his case. And he indeed claimed that the failure of the Utah Supreme Court to give him the retroactive benefit of the new standard denied him federal equal protection and due process rights. See

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[83] Denial of certiorari is appropriate where the position now urged by petitioner is contrary to that which was asserted in the courts below. Youakim v. Miller, 425 U.S. 231, 234 (1976); United States v. Mendenhall, 446 U.S. 544, 551-52 n. 5 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970); Delta Airlines v. August, 450 U.S. 346, 362 (1981). Certiorari is also appropriately denied where the decision below is based upon an independent and adequate state ground. R. Stern & E. Gressman, Supreme Court Practice, 168-85 (6th ed. 1986). That the Wood decision was grounded solely in state law should be adequate reason for denying certiorari, let alone the fact that the present petitioner failed to raise the issue in his own case. Moreover, as a corollary rule, errors of state law not rising to the level of constitutional defect are not cognizable on federal habeas corpus. Gryger v. Burke, 334 U.S. 728, 731 (1948); Engle v. Isaac, 456 U.S. 107, 120 n. 19 (1982); Barclay v. Florida, 463 U.S. 939, 957-58 (1983); Wainright v. Goode, 464 U.S. 78, 86 (1983); Pulley v. Harris, 465 U.S. 37, 42-43 (1984).

[84] A state court's decision whether to apply its decisional law retroactively raises no federal question per se, nor does its decision to extend retroactive application only to cases pending on direct appeal and not to cases which were already final. Rather, "[t]he federal constitution has no voice upon the subject" and this Court has left the states to develop their own rules on retroactivity. Great N.R. Co. v. Sunburst Oil and Ref. Co., 287 U.S. 358, 364 (1932).

[85] The Utah Supreme Court on direct appeal found that the sentencing instructions given in Andrews' case did provide a standard. The jury was adequately advised that the burden was on the State to show that the totality of the evidence of aggravating circumstances outweighs the totality of mitigating circumstances because the instructions placed the burden on the State to prove that the death penalty was appropriate (Sent. Inst. No. 2, St. R. 412) and required the jury to "weigh" the aggravating and mitigating factors (Sent. Inst. No. 1, St. R. 412). State v. Pierre, 572 P.2d at 1348.

paragraphs 14D, 14J, and 17 of that petition. Thus, neither the federal district court nor the Tenth Circuit directly analyzed the issue in the same context Andrews now presents on certiorari. Andrews v. Shulsen, 600 F. Supp. at 423; Andrews v. Shulsen, 802 F.2d at 1264-65. (This may explain why Andrews does not base this point of his petition for certiorari on a claim that the Tenth Circuit's ruling was in error). Moreover, both courts soundly rejected his claim that the refusal of the Utah Supreme Court to accord him the retroactive benefit of Wood violated his equal protection and due process rights. 600 F. Supp. at 426-30; 802 F.2d at 1270-71.[86] See also Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986), cert. denied ___U.S.___ (No. 86-6303, April 27, 1987) (the companion case to Andrews' wherein this Court denied certiorari on the same equal protection and due process issues). And even if Andrews had attempted to raise the issue in its present form for the first time on federal habeas corpus, his failure to present it on direct appeal as required by Utah law, see Andrews v. Morris, 607 P.2d at 819-20, or on collateral attack in the state courts, constitutes a procedural default that is governed by the cause and prejudice test. See Reed v. Ross, 468 U.S. 1 (1984); Murray v. Carrier, 106 S. Ct. 2639, 2646-48 (1986); and Smith v. Murray, 106 S. Ct. 2661, 2665-66 (1986). And the Utah Supreme Court's alternate finding that the failure to apply a Wood-type standard in Andrews' case was harmless error, see footnote 82, supra, clearly establishes that Andrews suffered no actual prejudice from the procedural default.

In summary, given the above factual and procedural posture of this case, the issue should not be reached. Petitioner has misstated essential facts to gain review of this claim on certiorari. Moreover, the claim was not adequately preserved below, it was procedurally defaulted for federal habeas corpus review, it was rooted in state law, and it was not framed in the same context in the lower courts.

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86 It now appears petitioner has abandoned this claim on certiorari.

Secondly, certiorari should be denied because the lower federal courts' opinions on the adequacy of the capital sentencing features applied in this case are in accord with this Court's prior rulings; the lower courts properly recognized that controlling decisions of this Court do not require the extreme sentencing standard petitioner now suggests; there is no conflict in the circuits on the issue; there is overwhelming concurrence among the jurisdictions that such a standard is not constitutionally required; and nothing has been shown by petitioner to warrant reexamination of the issue.

The constitutionality of Utah's overall capital sentencing system as it was applied in Andrews' case was fully explored by the lower federal courts in Andrews v. Shulsen, 600 F. Supp. at 420-25; and Andrews v. Shulsen, 802 F.2d at 1260-65. The system was measured with controlling Supreme Court case law and was found to meet present constitutional concerns. Id. Petitioner does not directly challenge this aspect of the lower courts' opinions, but nevertheless seeks a higher sentencing standard. Reviewing courts on federal habeas corpus should only determine what features of a state's system are constitutionally mandated, and not search for additional features to make a constitutionally fair system fairer. See Engle v. Isaac, 456 U.S. 107, 120 n. 19 (1982). Respondent submits that where a system, like Utah's, has been found to have the various features which have been approved by this Court, the extreme sentencing standard petitioner suggests is not necessary to suitably direct and limit sentencing discretion "so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion); accord Zant v.

Stephens, 462 U.S. 862, 874 (1983).[87]

This Court has repeatedly recognized this fact. No decision of this Court has imposed such a standard for weighing aggravating and mitigating factors, and at least one decision expressly states that such standards are not constitutionally required.

In Gregg, nothing was said by this Court as to a burden of proof beyond requiring that one statutory aggravating circumstance be found beyond a reasonable doubt to narrow the candidates for the death penalty. The Court did not impose any standard of proof with reference to the assessment of aggravating and mitigating factors even though Georgia's statute only required the sentencer to consider such factors. Later, in Zant, this Court again reviewed Georgia's system which the Court observed did not require the sentencer to give any special weight to any aggravating circumstances or balance them against mitigating factors by any specific standard. This Court concluded that so long as at least one statutory aggravating

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87 The most significant features include:

1. Utah statutes limit capital homicides to intentional and knowing murders committed under statutorily enumerated aggravating circumstances.

2. At least one statutorily defined aggravating circumstance must be proved beyond a reasonable doubt at the guilt phase (as an element of first degree murder) to narrow the class of persons who are subject to the death penalty. Cf. Zant v. Stephens, 462 U.S. 862, 876-78 (1983);

3. After conviction, a separate hearing on the issue of penalty is required. Aggravating and mitigating factors are presented which focus on the circumstances of the crime and the characteristics of the defendant.

4. Defendants are not precluded from putting on any facts in mitigation.

5. The jury in this case was given sentencing instructions providing that the burden was on the state to show that the totality of the evidence or aggravating circumstances outweighs the totality of the mitigating circumstances.

6. Sentencing verdicts must be unanimous.

7. Comprehensive appellate review including a review of a sentence of death for proportionality and to determine if the sentence resulted from prejudice or arbitrary action is provided.

circumstance is found beyond a reasonable doubt at some point in the proceedings to narrow the class of persons eligible for the death penalty, and so long as a state's appellate court reviews the sentencer's "consideration" of the factors in search of arbitrariness, capriciousness or disproportionality, "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." 462 U.S. at 876, n. 13.

In Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion), this Court reviewed Florida's system which merely required the sentencer to weigh the factors against one another and did not require proof beyond a reasonable doubt in the weighing process. The Court found that the process adequately focused the sentencer's attention on the circumstances of the crime and the character of the individual defendant--the criteria relevant to determining whether the death sentence should be imposed.[88] Id. at 251. Justice White's concurring opinion, joined by the Chief Justice and Justice Rehnquist further explained:

> [A]lthough the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. Under Florida law, the sentencing judge is required to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely . . . .

Id. at 260-61. Later, in Barclay v. Florida, 463 U.S. 939, 954 (1983), this Court observed that "Unlike the Georgia statute . . . Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances . . . . The statute does not establish any special standard for this weighing process."

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[88] The Court acknowledged that under Florida law evidence must be so "clear and convincing that no reasonable person could differ", 428 U.S. 249, but that was only in discussing the circumstances in which the trial judge could override the advisory opinion of a jury for life imprisonment.

Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion), is also not supportive of such a standard. Texas' scheme only required that the jury find one of three statutory sentencing conditions beyond a reasonable doubt. These are necessary aggravating conditions in order to impose the death penalty.[89] This Court noted the presence of the statutory conditions required a narrow focusing on relevant criteria. However, the Texas statutory provision did not provide for a weighing of the aggravating circumstances against the mitigating ones. Rather, mitigating evidence could be introduced bearing on the aggravating proposition that had to be found beyond a reasonable doubt. This Court did not discuss a burden of proof standard nor suggest that any standard was constitutionally mandated as to the weighing process.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court reviewed Oklahoma's scheme which provides that the sentencer must find that aggravating circumstances outweigh mitigating evidence. No burden of proof is stated for this weighing process. Although not a central issue in the case, repeated emphasis was made by this Court that the sentencer and reviewing state appellate court "may determine the weight to be given relevant mitigating evidence." Id. at 115. The Court concluded that:

> On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them.

Id. at 117. Similarly, throughout the Chief Justice's dissenting opinion, he consistently analyzes a court's consideratio of the sentencing criteria in terms of a "weighing" process where mitigating evidence may or may not "tip the scales" in its direction or "offset the aggravating circumstances." Id. at 122,

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89 One of the three conditions is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Texas Code of Crim. Pro., Art. 37.071(b)(2). Such a determination requires consideration of behavioral, sociological, and psychological factors, which clearly do not lend themselves well to any burden of proof, particularly a reasonable doubt standard. The other two conditions are purely factual questions where the reasonable doubt standard is at least somewhat functional.

125-27. Thus, both the dissent and the majority talk exclusively about merely weighing the mitigating factors against the aggravating factors.

Petitioner quotes a passage from Wood referring to Woodson v. North Carolina, 428 U.S. 280, 303 (1976), which stressed the need for reliability in determining the appropriateness of the death penalty in a specific case. Taken in context, the language in Woodson related solely to the constitutionality of mandatory death sentencing, and did not relate to a quantum of proof required but to the need to differentiate between offenders according to the criminality of their acts. Petitioner also cites In re Winship, 397 U.S. 358 (1970). There is nothing in Winship that would suggest the need for a finding beyond a reasonable doubt in capital sentencing proceedings. It dealt only with the burden of proof of factual guilt in a criminal case. The standard was required in order to reduce "the risk of convictions resting on factual error." Id. at 363. There is no comparison of factual issues in evaluating aggravating circumstances and mitigating circumstances. Such comparisons do not necessarily interface, and circumstances that may be deemed mitigating may not necessarily be matters susceptible to precise factual proof. Cf. Eddings v. Texas, 441 U.S. 418, 430 (1979).[90]

Petitioner further relies on Justices Marshall's and Brennan's dissent from the denial of certiorari in Teague v. Tennessee, 473 U.S. 911 (1985) and Justice Stevens' comments on the denial of certiorari in Finch v. North Carolina, 459 U.S. 1056 (1982) as illustrative of possible Court interest in the Wood-type standard of proof issue. However, in Teague, the Justices' sole concern was that Tennessee law mandates death if

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90 Consider, for example, the situation in Eddings, supra, where error was found because the sentencer refused to consider mitigating circumstances of the defendant's unhappy upbringing and emotional disturbance, turbulent family life, and harsh discipline by his father. It would be impossible to contrast these with the aggravating factor of shooting a policeman and arrive at any basic conclusion beyond a reasonable doubt. The reasonable doubt standard simply does not lend itself to application when the finding is based on moral and social values rather than particular facts.

the jury determines that the mitigating factors do not outweigh the aggravating factors. The law provides no opportunity for mercy, and it was the Justices' view that juries should always be free to confront the ultimate question of whether death is the appropriate punishment in the specific case even where mitigating factors do not outweigh aggravating factors.[91] They expressed no concern over whether burdens of proof should attach at the penalty phase to the weighing of the factors. In Pinch, Justice Stevens' concern was the same. There appeared to be sufficient ambiguity in the sentencing instructions to eliminate the possible exercise of mercy upon a finding that aggravating outweigh mitigating circumstances. This is not the issue Andrews raises in the instant case.

Petitioner concedes in his petition that "[t]he federal circuits that have considered this issue have rejected such a standard . . . ." Pet. for Cert. at 29 (citing Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983), cert. denied, 464

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91 Utah law does not mandate death as Tennessee law did. Nor was Andrews' jury given sentencing instructions that could be construed as mandating death upon finding that aggravating factors outweigh the mitigating.

U.S. 865 (1984)[92]; Harris v. Pulley, 692 F.2d 1189, 1192, 1195 (9th Cir.), cert. denied, 460 U.S. 1047 (1983). Other state and federal jurisdictions are in accord. See Gray v. Lucas, 677 F.2d 1086, 1105-06 (5th Cir.), reh'g denied 685 F.2d 139, cert. denied, 461 U.S. 910 (1983); United States v. Matthews, 73 M.J. 501 (1980)(en banc)(aggravating and mitigating factors need not be weighed under any burden of proof); People v. Frierson, 25 Cal.3d 142, 158 Cal. Rptr. 281, 599 P.2d 587, 610 (1979) (reasonable doubt standard not required at penalty phase for weighing aggravating and mitigating factors); State v. Gretzler, 609 P.2d 48, 56-57 (Ariz.), cert. denied 449 U.S. 938 (1980); State v. Pritchett, 621 S.W.2d 127, 141 (Tenn. 1981); Smith v. Commonwealth, 599 S.W.2d 900, 911-12 (Ky. 1980); Jackson v. State, 337 So.2d 1242, 1256-57 (Miss. 1976); State v. Simants, 250 N.W.2d 881, 892-93 (Neb.), cert. denied, 434 U.S. 878 (1977);

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92 In Ford, the Eleventh Circuit was fully aware of Utah's Wood case and soundly rejected it stating:

> Third, Ford's argument under In re Winship seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard [citations omitted], the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and unlike facts, is not susceptible to proof by either party. Petitioner's contrary suggestion is based on a misunderstanding of the weighing process, the statute and the guiding and channeling function identified in Proffitt v. Florida [citation omitted]. Indeed, it appears no case has applied In re Winship in the manner Ford urges. The North Carolina and Utah cases cited by him which imposed a reasonable doubt standard in this situation turned on construction of state statutes rather than the due process rationale of In re Winship. See State v. Johnson, 257 S.E.2d at 617, and State v. Woods [sic] [citation omitted].
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> Ford's alternate argument . . . is that the Florida capital sentencing proceeding involves new findings of fact significantly affecting punishment to which the full panoply of due process rights should be extended, including the requirement that the state prove beyond a reasonable doubt that aggravating factors outweigh mitigating factors. Again petitioner confuses proof of facts with the weighing process undertaken by the sentencing jury and judge. Because the latter process is not a fact susceptible of proof under any standard, we reject this contention.
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> Id. (Emphasis is the court's).

Irvin v. State, 617 P.2d 588 (Okla. 1980); State v. Shaw, 272 S.C. 194, 255 S.E.2d 799, 804, cert. denied, 444 U.S. 1026-27 (1979); Ybarra v. State, 679 P.2d 797, 801-03 (Nev.), cert. denied, 470 U.S. 1009 (1985). Given there is no split among the circuits and overwhelming concurrence by the various jurisdictions on the issue, certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this 16 day of November, 1987.

DAVID L. WILKISON
Attorney General of Utah

EARL F. DORIUS, Counsel
of Record
Assistant Attorney General
of Utah
Attorneys for Respondent

CERTIFICATE OF MAILING

This is to certify that I mailed one copy of the foregoing Brief in Opposition to Petition for Certiorari, by depositing same in the United States Mail, first class, postage prepaid, this 16 day of November, 1987, to the following:

Timothy K. Ford
Attorney at Law
600 Pioneer Building
Seattle, Washington 98104

Counsel of Record for Petitioner